TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 559.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1923.
CERTIORARI AND RETURN FILED NOVEMBER 6, 1923.

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1 [Caption omitted.]

2 In United States District Court.

Libel of information in forfeiture.

Filed Jan. 12, 1920.

E. S. Wertz, United States attorney for the Northern District of Ohio, who, for the United States in this behalf prosecutes, exhibits this, his information against ninety-five barrels, more or less, alleged apple cider vinegar, heretofore shipped in interstate commerce by the Douglas Packing Co., from Fairport, N. Y., to Fisher Bros., Cleveland, in the State of Ohio, by way of the New York Central Railroad Company, a common carrier, engaged in carrying freight from one State of the United States to another State of the United States, and particularly from said Fairport, N. Y., to said Cleveland, Ohio; said ninety-five barrels, more or less, alleged apple cider vinegar, received as aforesaid, in interstate commerce into the said city of Cleveland, by way of the said New York Central Railroad Company, are now in the possession of Fisher Bros. at Cleveland, Ohio; and thereupon said United States attorney does allege and give the court to understand and be informed as follows:

I.

That the aforesaid barrels of vinegar are labeled on one top of the barrel as follows:

" Douglas Packing Company
Excelsior vinegar made from selected apples
Four per centum
Rochester, N. Y."

that the other end of the aforesaid barrels of vingar are labeled as follows:

" Manufactured to comply with all pure food laws
Douglas Packing Company,
Rochester, N. Y."

That analysis of the sample shows the product consists wholly or in part of vinegar made from evaporated or dried apples; which said vinegar is adulterated and misbranded within the meaning of and contrary to the provisions of the act of Congress of June 30, 1906, commonly known and designated as the food and drugs act, in the following particulars, viz:

(a) That the said ninety-five barrels, more or less, alleged apple cider vinegar, labeled as aforesaid, are adulterated, in that
3 vinegar made from evaporated or dried apple products has been mixed and packed with and substituted wholly or in part for the article, contrary to and in violation of paragraphs first and second under food, of section 7, of the food and drugs act aforesaid.

(b) That the said ninety-five barrels, more or less, alleged apple cider vinegar, labeled as aforesaid, are misbranded, in that the statements on label "Vinegar made from selected apples and manufactured to comply with all pure food laws," are false and misleading and deceive and mislead the purchaser, since analysis shows the above results, contrary to and in violation of paragraphs second and fourth under food, of section 8, and general paragraph, of section 8, of the food and drugs act aforesaid.

(c) That the said ninety-five barrels, more or less, alleged apple cider vinegar, labeled as aforesaid, are further misbranded, in that it is an imitation of and offered for sale under the distinctive name of another article, to wit, apple cider vinegar, contrary to and in violation of paragraph first, of section 8, of the food and drugs act aforesaid.

And wherefore said attorney says that the said ninety-five barrels, more or less, alleged apple cider vinegar, labeled as aforesaid, are adulterated and misbranded within the meaning of the said act of Congress and are subject to seizure and confiscation within the meaning of and intent of section 10 of the said act.

II.

That the said ninety-five barrels, more or less, alleged apple cider vinegar, as aforesaid, were shipped on or about November 24, 1919, in interstate commerce from the Douglas Packing Co., Fairport, N. Y., via the New York Central Railroad Company to Fisher Bros., Cleveland, Ohio, in the division and district aforesaid, and within the jurisdiction of this court.

That the said attorney of the United States who prosecutes as aforesaid for the United States, says that all and sigular the premises are true, and that the said ninety-five barrels, more or less, alleged apple cider vinegar, are now within the jurisdiction of the United States and of this court.

Wherefore, for the United States, said attorney prays that a writ of attachment and monition in due form of law according
4 to the course of this court in such cases, may be issued against said product, and that all persons having any interest in the same may be cited to appear and answer all and singular the matters aforesaid, and that said products may be seized for confiscation by process of libel of condemnation, and that if such product contained therein is condemned as being adulterated and misbranded within the meaning of said food and drugs act of June 30, 1906, that the same may be disposed of by destruction or sale as the court may direct, and that the proceeds thereof, if sold, less the legal costs and charges, may be put into the Treasury of the United State.

E. S. WERTZ,
United States Attorney.

[Jurat showing the foregoing was duly sworn to by E. S. Wertz, omitted in printing.]

Praecipe.

Filed Jan. 12, 1920.

To the Clerk:

Please issue warrant of seizure and monition herein against ninety-five barrels, more or less, alleged apple cider vinegar, and summons for service to the Douglas Packing Co., Fairport, N. Y., and to Fisher Bros., of Cleveland, Ohio, and all other persons concerned herein. This ____ day of January, 1920.

E. S. WERTZ,
United States Attorney.

5 In United States District Court.

Stipulation, amending libel.

It is hereby stipulated and agreed by and between the undersigned counsel for the respective parties hereto that the libel filed herein for the United States may be corrected and amended in the following particulars:

1. Insert on page one in lieu of the label quoted the following corrected recital of the label appearing in said barrels of vinegar herein described:

" Douglas Packing Company
Excelsior Brand apple cider vinegar made
from selected apples
Reduced to 4 per centum
Rochester, N. Y.
Guaranteed to comply with all pure food laws
Douglas Packing Company
Rochester, N. Y."

2. Insert on page two, line twenty-two subparagraph (b) the word " guaranteed " in lieu of the word " manufactured."

It is further stipulated and agreed by said counsel that the demurrer heretofore filed herein may stand to the libel as above amended, and that the hearing and argument proceed thereon on April 1, 1922, as originally set.

JOSEPH C. BREITENSTEIN,
Asst. U. S. States Attorney.
WHITE, JOHNSON, CANNON & SPIETH,
Attorney for Douglas Packing Company, Claimant.

In United States District Court.

Amendments to libel.

Now comes E. S. Wertz, attorney for the libellant, and in accordance with the stipulations filed herein amends the libel of information heretofore filed, in the following particulars:

6 I.

By inserting on page 1 and 2, in lieu of the label quoted, the following recital of the label appearing on said barrels of vinegar described therein:

"Douglas Packing Company
Excelsior Brand apple cider vinegar made
from selected apples
Reduced to 4 per centum
Rochester, N. Y.
Guaranteed to comply with all pure food laws
Douglas Packing Company
Rochester, N. Y."

II.

By inserting on page 2, line 22, subparagraph "b," the word "guaranteed" in lieu of the word "manufactured."

JOSEPH C. BREITENSTEIN,
Asst. U. S. States Attorney.

In United States District Court.

Claim of Douglas Packing Company.

Filed April 12, 1920.

Comes now the Douglas Packing Company and represents unto this court that it is the owner of the ninety-five barrels, more or less, apple cider vinegar seized in the above entitled action, and that no other person, firm, or corporation has any interest in said vinegar other than itself, and prays this honorable court that said claimant shall have restitution of the said ninety-five barrels, more or less, apple cider vinegar, and for such other and further relief as to the court may seem meet.

DOUGLAS PACKING COMPANY,
By WHITE, JOHNSON, CANNON & SPIETH,
Its Attorneys and Proctors.

7 [Jurat showing the foregoing was duly sworn to by Earl J. Neville omitted in printing.]

8 In United States District Court.

Answer of Douglas Packing Company, Claimant.

Filed April 16, 1920; refiled August 22, 1922.

And now comes the claimant, the Douglas Packing Company, by White, Johnson, Cannon, and Spieth, its attorneys, and for answer to the libel of the United States of America filed herein, says:

That it is a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of said State.

I.

Claimant denies the averments in Article I of said libel in the manner and form as therein set forth, and avers the fact is that said barrels of vinegar, libeled herein, are labeled on one end of the barrel as follows:

"Douglas Packing Company
Excelsior Brand apple cider vinegar
Made from selected apples
Reduced to 4 per centum
Rochester, New York."

and that the other end of said barrels of vinegar are labeled as follows:

"Guaranteed to comply with all
Pure food laws.
Douglas Packing Company,
Rochester, New York."

Claimant admits that evaporated apples were used in the manufacture of said vinegar, but alleges the fact to be that said vinegar is nevertheless pure apple cider vinegar.

It denies that said vinegar is adulterated and misbranded, within the meaning of and contrary to the provisions of the act of Congress of June 30, 1906, commonly known and designated as the food and drugs act, and particularly denies:

(a) That said vinegar, though evaporated apples were used in the manufacture thereof, is adulterated contrary to and in violation of paragraphs first and second under food, of section 7 of the food and drugs act, aforesaid.

9 (b) That said vinegar is misbranded contrary to and in violation of paragraphs second and fourth under food of section 8, and general paragraph of section 8 of the food and drugs act, as aforesaid; and alleges the fact to be that the statements on said labels

"Excelsior Brand apple cider vinegar
Made from selected apples"

and

"Guaranteed to comply with all
Pure food laws"

are true and correct, and claimant denies that said words and figures are false and misleading, and deceive and mislead the purchaser as alleged in subhead B of paragraph I of said libel.

(c) That said vinegar is further misbranded in that it is an imitation of and offered for sale under the distinctive name of another article, to wit: "Apple cider vinegar," contrary to and in violation of paragraph first of section 8 of the food and drugs act, aforesaid.

Claimant again avers and insists that said vinegar is pure apple cider vinegar, and denies that it is subject to seizure and confiscation within the meaning and intent of Section 10 of said Act.

II.

Claimant admits that said barrels of apple cider vinegar, as aforesaid, were shipped in interstate commerce by it from Fairport, New York, to Fisher Brothers, Cleveland, in the State of Ohio, in the division and district aforesaid, via the New York Central Railroad Company on or about November 24, 1919, as averred in paragraph II of said libel, and that said apple cider vinegar was at the time of the commencement of this action, and still is, within the jurisdiction of the United States and of this court.

III.

It denies that the averments of said libel are true, save as hereinbefore admitted, and avers that the charges in relation thereto are as hereinbefore set forth.

Therefore, claimant prays that this honorable court will pronounce against the demand of the libelant in this libel mention, with costs.

WHITE, JOHNSON, CANNON & SPIETH,
Attorneys for Plaintiff.

10 [Jurat showing the foregoing was duly sworn to by Earl J. Neville omitted in printing.]

11 In United States District Court.

Application by claimant, Douglas Packing Company.

Filed Jan. 30, 1922.

Now comes the claimant, The Douglas Packing Company, and moves the court for an order permitting it to withdraw the answer which it heretofore filed in this case and granting leave to file its demurrer instanter.

WHITE, JOHNSON, CANNON & SPIETH,
Attorneys for Douglas Packing Co.

In United States District Court.

Order granting motion to withdraw answer.

Entered Jan. 30, 1922, by D. C. Westenhaver, Judge.

This matter came on this day to be heard, on the application of The Douglas Packing Company for leave to withdraw its answer and to file a demurrer, and on due consideration, the court being fully advised in the premises, said motion is granted.

In United States District Court.

Demurrer by Douglas Packing Company to libel of information.

Filed Jan. 30, 1922.

Now comes the claimant, DOUGLAS PACKING COMPANY, by its attorneys, WHITE, JOHNSON, CANNON & SPIETH, and demurs to the libel of information in forfeiture, and for cause says:—

Said libel does not state facts constituting a cause of action and warranting the relief prayed for.

WHITE, JOHNSON, CANNON & SPIETH,
Attorneys for Douglas Packing Co.

12 In United States District Court.

Opinion of court on demurrer.

Filed April 29, 1922.

WESTENHAVER, *J.*

The Court: This case was argued and submitted on a general demurrer by the defendant to the libel. At the time it was submitted counsel for defendant announced that the defendant desired a trial of the case on the merits at the time the case was assigned for trial on the calendar, in the event this demurrer should be overruled. Whether that trial can be had, even if the demurrer is overruled, depends upon the state of the trial calendar, and if the trial is to be before a jury, and upon oral testimony, I foresee that it will not be possible to meet with the wishes of counsel. However, in order that the case may be placed in condition for trial as soon as possible, I have decided to dispose of the demurrer now by an oral announcement, foregoing my original purpose of making an extended consideration of the authorities cited and filing a written memorandum.

The libel charges that the ninety-five barrels of vinegar in question were adulterated and misbranded under the pure food and drugs act. The libel shows that branding to be as follows:

"Douglas Packing Company
Excelsior Brand apple cider vinegar made
from selected apples
Reduced to four per centum,
Rochester, N. Y.
Guaranteed to comply with all pure food laws
Douglas Packing Company,
Rochester, N. Y."

The libel further alleges that the product thus labeled consisted in whole, or in part, of vinegar made from evaporated or dried fruit, and that vinegar thus made from evaporated or dried fruit is an adulteration of vinegar within the meaning of the food and drugs act. Whether this is in fact an adulteration, I am not at this time prepared to say. The case of adulteration is not so strong as is the case made by the libel as to the misbranding, and it is on this latter ground that I feel the demurrer must be overruled.

Respecting the misbranding, the allegations of the libel are that these ninety-five barrels of alleged apple cider vinegar are misbranded in that the statements of label represent that it is
13 apple cider vinegar made from selected apples and manufactured to comply with all pure food laws, including therein State as well as national food laws; that these allegations are false and misleading and tend to deceive and mislead the purchaser, since the analysis shows that the vinegar was made in part, at least, from evaporated or dried fruit; also that this label is misleading in that the product to which the label is applied is an imitation of, and offered for sale under the distinctive name of another article, to wit, apple cider vinegar. These allegations of the libel characterize and interpret, in a general way, the alleged misleading brand.

It is further averred that cider, or vinegar made from evaporated or dried apples, is not the same thing as apple cider vinegar made from the fresh juice of fresh apples, and that this label conveys to the ordinary purchaser, the general public which buys and uses vinegar, the false, erroneous and misleading impression that it is made from the fresh juice, or cider, of fresh apples. It is true that these general allegations are an interpretation, or characterization, of the words of the label, but at the same time it is settled law that general allegations are sufficient in the absence of an allegation to make more definite and certain, and will sustain a pleading against a general demurrer. In the face of these allegations I could not well, on demurrer, hold that there is not at least a charge in the libel of misbranding. These allegations do charge that vinegar made from evaporated or dried apples is not the same thing as vinegar made from the fresh juice of apples, or cider, in the ordinary acceptation of the word. In substance this is a charge that there is substituted for apple cider vinegar made from cider, as that word is commonly

understood, another and a different product, or, at least, a product made by a process other and different from that which the ordinary purchaser would understand from this label was used. Upon this interpretation of the libel I feel myself bound to overrule the demurrer.

I can not well take judicial notice of the facts urged in support of the demurrer, as tending to show that there was no adulteration or misbranding. Defendant's contentions, I understand, are these: that apples are first selected, that they are then dried and evaporated, that the process used in drying and evaporating does nothing to the apples except to extract therefrom the water contained in the
14 apples and present in fresh cider; that in the drying, or evaporating process, sulphuric acid, or another chemical, is used in small quantities, but that later when these apples are to be used they are then put through some process; that this new process consists merely in restoring the water originally extracted; that cider of the same taste, kind and quality as fresh cider can, and is, then made from these apples, and that the amount of sulphuric acid, or other acid, is eliminated by precipitation. This, it is claimed, produces cider in the same sense as the word is understood when applied to the fresh juice of apples. It is further claimed that this cider has the same constituent qualities and is of the same taste as fresh apple juice and is, in fact, that product which the common man, has from time immemorial understood is meant by the word cider. It is further contended that this cider passes through the same process of fermentation, thereby producing alcohol, and through the further processes of chemical changes, whereby the alcohol is destroyed and converted into acetic acid, and that the resultant product is vinegar conforming with the Government's standards for vinegar, that is, therefore, apple cider vinegar in the same sense in which that phrase is understood and within the meaning of the label.

Whether if these facts were proved and this process disclosed these results the charge of adulteration or misbranding would still be sustained is the meritorious question which the parties desire the court to decide. If I had these facts before me in such a way as to make them a part of the record, I would be willing to decide it. I do not, however, feel at liberty upon this demurrer to assume these facts to be true and then express an opinion thereon. I would not thereby be deciding any question involved in the case. If, upon such an assumption of the facts I should sustain the demurrer, and the Government should then elect to stand upon its demurrer and prosecute error, the defendant would, in the Circuit Court of Appeals, be confronted, as I am confronted with the allegations of the libel, and if that court took the view that I take as to the meaning of the allegations of the libel, a reversal would result with no expression of opinion upon the question of merit. If, on the other hand, upon that assumed state of facts I should overrule the demurrer and the plaintiff should elect to stand thereon and a final judgment were rendered, then on error the parties would be confronted in the Circuit

Court of Appeals with the same difficulty. The defend-
15 ant would not, in that event, be able to get an expression of opinion in that court upon the merits. The fact is, that the question which the parties wish decided is now presented only in moot form.

For these reasons I am of the opinion that the demurrer should be overruled. It seems to me that the parties should have no difficulty in stipulating or agreeing upon these facts. If they are unwilling or unable to agree, then the best suggestion I can make, in order to get the question promptly decided, is that they file a stipulation in writing, waiving the right to a jury trial and consent that the testimony may be taken before a master. If this were done, no doubt I could find an open hour some day in the near future when the case could be presented and heard.

In taking testimony it does not seem to me that it would be helpful to bring in the testimony of jobbers and merchants to testify how they interpret, or understand, this label or brand. That kind of testimony seems to have been produced before Judge Geiger. I leave, however, counsel to determine the range of testimony if they should agree to have it taken before a master. If the case were heard before me, I am inclined to think I should sustain an objection to testimony of that kind.

The demurrer is overruled and an exception may be noted.

In United States District Court.

Order overruling demurrer.

Entered April 29, 1922, by D. C. Westenhaver, Judge.

This cause having been submitted to the court on a previous term of this court, on the demurrer of the Douglas Packing Company, on consideration thereof the court overruled said demurrer, to which ruling of the court the Douglas Packing Company, by its attorneys, excepts.

16 In United States District Court.

Agreed statement of facts.

Filed Aug. 22, 1922.

Libellant and claimant herein, desiring to submit this case to the court, upon the pleadings and an agreed statements of facts, hereby stipulate and agree that:

(1) Claimant, the Douglas Packing Company, is a New York corporation, with its principal office in the city of Rochester, New York, and with factories at Fairport and Canastota, New York. It is now and has been since January first, 1906, engaged in manu-

facturing food products from evaporated and unevaporated apples. From fresh apples it manufactures apple cider and apple cider vinegar, and from the evaporated apples it manufactures, by a process which is fully described in the section numbered (4) hereof products which it designates as "apple cider" and "apple cider vinegar." From the pulp of unevaporated apples and the pulp of the evaporated material it manufactures a product which it calls "Pectin."

(2) During the apple season, between about September 25th and December 15th, sound, mature, unevaporated apples are used by claimant, and for the balance of the year evaporated apples of like quality, including as large a portion thereof as claimant can manufacture in its own evaporating plants, located one in Vermont, one in Massachusetts, and one at Canastota, New York.

(3) With such apples as are evaporated by claimant the most approved process for dehydrating fruits is used. In dehydrating, small quantities of sulphur fumes are used to prevent rot, fermentation, and the consequent discoloration. The principal result of the dehydration process is the removal of about eighty per cent (80%) of the water. Whether and to what extent any other constituents of the apple are removed by the process of dehydration is not wholly beyond controversy; in the present state of chemical science no accepted test or method of analysis is provided, so far as the parties to this controversy are advised, for determining to what extent any constituents of the apple other than water are removed by the process of dehydration. Only mature, sound fruit, free from rot and fement, can be economically and advantageously used.

(4) In manufacturing from evaporated apples, claimant places in a receptacle a quantity of such evaporated apples to which
17 an amount of pure water substantially equivalent to that removed in the evaporating process has been added. A weight of more than one (1) ton is then placed on top of the apples and a stream of water, under a sufficient head, introduced through a pipe at the top of the receptacle, is applied until the liquid, released through a vent at the bottom of the receptacle, which vent opens as the stream of water is applied and closes as it ceases, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar.

Such liquid, which is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used carries a small and entirely harmless quantity of sulphur dioxide, which is removed during the process of fining and filtration, by the addition of barium carbonate, or some other proper chemical agent, which by precipitation eliminates such sulphur compounds.

The liquid is then subjected to alcoholic and subsequent acetic fermentation in the same manner followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples.

Claimant employs the same receptacles, equipment, and process of manufacturing for evaporated as for unevaporated apples except that in the case of evaporated apples pure water is added as aforesaid, and in the process of fining and filtration an additional chemical agent is used to precipitate any sulphur compounds present and resulting from dehydration.

After fining and filtration, the resultant liquid obtained by claimant upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except that the liquid made from evaporated contains a trace of barium incident to the process of manufacture. There is no claim by the libellant that this trace of barium renders the product deleterious or injurious to health.

The vinegar made from the resultant liquid is similar in taste and in composition to the vinegar made from unevaporated apples, except that the vinegar made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by the libellant that this trace of barium renders the product deleterious or injurious to health.

It is conceded that the vinegar involved in this proceeding is vinegar made from dried or evaporated apples by substantially the foregoing process.

18 (5) There is no claim by libellant that the vinegar manufactured by claimant, and seized in the respective actions in this jurisdiction, is inferior to that made from unevaporated apples.

(6) Since January 1, 1906, until the commencement of this action, claimant has sold, throughout the United States, its product, manufactured from unevaporated as well as evaporated apples, as "apple cider" and "apple cider vinegar," selling its vinegar under the brand "Excelsior Brand apple cider vinegar made from selected apples," or "Sun Bright Brand apple cider vinegar made from selected apples." At the time of the commencement of this action claimant was so manufacturing and selling about 100,000 barrels of vinegar a year.

(7) Each of the parties hereto may submit such exhibits, properly labeled and identified, as they desire of the liquids from unevaporated apples and evaporated apples, including samples of the vinegar seized in this jurisdiction.

(8) It is not disputed or questioned in this case that the juice of unevaporated apples, when subjected to alcoholic and subsequent acetous fermentation, is entitled to the name "apple cider vinegar."

(9) For several years prior to the enactment of the Federal food and drugs act and subsequent thereto, vinegar in large quantities and to a certain extent a beverage, made from evaporated apples, were sold in various parts of the United States as "apple cider vinegar" and "apple cider," respectively, by many manufacturers, including the American Fruit Products Company, of which company

Robert Douglas, president of claimant company, had been production manager. The American Fruit Products Company operated eleven plants located in New England, New York, and Michigan.

(10) Since January 1, 1906, the claimant has manufactured such products and sold them labeled "Apple cider vinegar" and "Apple cider," respectively, and in doing so acted in good faith.

The United States Department of Agriculture has never sanctioned such labeling, and its attitude with reference thereto is evidenced by the definition of "apple cider vinegar" set forth in circulars 13, 17, 19, and 136 of the Office of the Secretary of the United States Department of Agriculture and Food Inspection Decision 140.

19 (11) From the report of the United States Census Bureau it appears that in 1910 there were 430 manufacturers of cider and vinegar, and the value of the product manufactured was $2,254,000.00, and from the report of the Census Bureau of 1920 there were 720 engaged in the manufacture of cider and vinegar, and the value of the product manufactured was $24,671,000.00.

GERARD J. PILLIOD,
Assistant United States Attorney.

United States Attorney, for Libellant.
WHITE, CANNON & SPIETH,
Attorneys for Claimant.

In United States District Court.

Answer.

Refiled Aug. 22, 1922.

(See page 8 of this record.)

In United States District Court.

Stipulation waiving trial to jury.

Filed Sept. 14, 1922.

The undersigned, libelant and claimant in this action, agree that a jury is waived on the trial of this cause and that the same shall be submitted to the court in lieu of a jury to find upon the issues of fact arising therein.

Dated, September 14th, 1922.

E. S. WERTZ,
U. S. Attorney.
WHITE, CANNON & SPIETH,
Attorneys for Claimant, The Douglas Packing Company.

20 In United States District Court.

Order directing that exhibit of claimant be placed in cold storage.

Entered Sept. 27, 1922, by D. C. Westenhaver, judge.

It appearing to the court that the claimant, the Douglas Packing Company, has filed herein an exhibit consisting of sample bottles of cider, sweet and fermented, and vinegar, under an agreed statement of facts, and that said sample, in order to be preserved in its present state, should be placed in cold storage until such time as it is to be used in the hearing of this case.

It is hereby ordered that such exhibit be placed in the cold storage department of the Sheriff Street Market, Cleveland, Ohio, the claimant herein, the Douglas Packing Company, to pay the storage and expenses incident thereto.

In United States District Court.

Opinion.

Filed Nov. 1, 1922.

WESTENHAVER, *District Judge:*

The Government has seized and libeled, and now seeks to condemn 95 barrels of vinegar shipped in interstate commerce, on the ground that this vinegar is adulterated and misbranded. The shipper, Douglas Packing Company, has appeared and claimed the vinegar, and makes defense. A jury trial has been waived in writing, and the case tried to the court on an agreed statement of facts.

None of the material facts is in dispute. The vinegar is labeled "Excelsior Brand apple cider vinegar made from selected apples reduced to four per centum. Guaranteed to comply with all pure food laws." This vinegar is not made from the expressed juice of fresh apples as pure cider vinegar is commonly understood to
21 be made, but is made from evaporated apples. Claimant, it is agreed, selects mature, sound fruit, free from rot and ferment, and dehydrates same by the most approved processes. In the process of dehydrating, small quantities of sulphur fumes are used to prevent rot and fermentation and subsequent discoloration. The principal result of dehydration is the removal of about eighty per cent of the water content of the apples. Whether in dehydration any other constituents of the apple are removed, is not beyond controversy, as in the present state of chemical science no accepted test or method of analysis is known to the parties for determining that problem. In manufacturing vinegar from apples thus evaporated, claimant places in a suitable receptacle a given quantity of evaporated apples, to which is then added an amount of pure water substantially equal to the amount previously removed by evaporation.

Pressure is applied at the top of this mass, and a stream of water under sufficient head is introduced at the top through a pipe and is applied until the liquid released through a vent at the bottom has carried off in solution such constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar. The liquid product thus obtained, it is agreed, is substantially equal in quantity to that which would have been obtained had fresh apples been used. This liquid carries a small and entirely harmless quantity of sulphur dioxide, which is removed later in the process of fining and filtration by the addition of barium carbonate or some other proper chemical agent which by precipitation eliminates the sulphur compound. The liquid, after this treatment, gives, upon chemical analysis, results similar to those obtained by the chemical analysis of apple cider made from fresh apples, except that it contains a trace of barium. No claim is made that this trace of barium renders the product deleterious or injurious to health. The subsequent process of alcoholic and acetic fermentation is the same as that commonly followed in making vinegar from the expressed juice of fresh apples. The vinegar thus made is similar in taste and composition to the vinegar made in the usual way from fresh apples, except that it contains a trace of barium. No claim is made that this trace of barium renders the product deleterious or injurious to health. Claimant uses in making vinegar in this way, the same receptacles, equipment, and process as is used in making cider and vinegar from unevaporated apples. It has been making and
22 selling apple cider and apple cider vinegar thus produced, continuously from a period antedating January 1, 1906. Other cider and vinegar makers have been doing the same. The total amount thus produced and sold has been and is very large. The United States Department of Agriculture has, however, never sanctioned such labeling and its attitude with respect thereto is evidenced by circulars 13, 17, 19, and 136, and Food Inspection Decision 140. Exhibit samples of cider fermented and unfermented made from fresh and evaporated apples, and vinegar made from both kinds of cider, have been submitted and were personally examined by me. There are slight differences in appearance and taste, but all have the appearance and taste of cider and vinegar. The foregoing are all the facts material to the determination of this controversy.

The Government claims that the vinegar in question thus manufactured is adulterated, in that there is substituted for genuine apple cider vinegar a manufactured product from evaporated apples, in violation of par. 1 and 2, sec. 7, food and drug act, June 30, 1906; also that it is misbranded, in that the statements on the label, "Apple cider vinegar made from selected apples and guaranteed to comply with all pure food laws," are false and misleading, in violation of general paragraph, sec. 8, and par. 2 and 4, sec. 8 of said act; and also that it is misbranded, in that it is labeled in imitation

of and offered for sale under the distinctive name of another article, to wit, apple cider vinegar, in violation of par. 1, sec. 8 of said act. Claimant vigorously and earnestly disputes each and all of these contentions.

This case has received the careful consideration which the magnitude of the interests and the importance of the question involved have demanded. My conclusion is in accord with the unreported decision of Judge Geiger of the Eastern District of Wisconsin. In my opinion, this vinegar is misbranded, if not adulterated, within the meaning of said act.

Vinegar is a food product, as defined in sec 6 (U. S. Comp. Stat. 1916, sec. 8722) of said act. It is probably not adulterated within the meaning of par. 1, sec. 7. Whether it is adulterated within the meaning of par. 2, sec. 7, will not be determined by me. The question of whether it is adulterated within the meaning of that paragraph turns on whether or not vinegar manufactured by the process above described is a substitution in whole or in part of one
23 article for another; that is, a spurious vinegar for apple cider vinegar. Claimant's contention is that apple cider made by expressing the juice of fresh apples, and its liquid product produced as above described, from evaporated apples, are both apple cider, and that the difference resolves itself merely to a controversy over the process by which apple cider and apple cider vinegar are made. However, as I am content to dispose of this case upon the question of misbranding alone, no opinion need or should be expressed upon this aspect of the controversy.

The applicable provisions of the food & drug act with respect to misbranding, are sec. 8, general paragraph, and paragraphs 1 and 2 and 4 of sec. 8. The general paragraph of sec. 8 provides: "The term 'misbranded' as used herein shall apply to all * * * articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances therein contained which shall be false or misleading in any particular." Thus is appears that the false or misleading statement which is forbidden applies as much to the food article as to the ingredients or substances of which it is made: hence any statement regarding the article which is false or misleading, is within the definition of "misbranding." Par. 2 provides that in case of foods an article shall be deemed to be misbranded "if it be labeled or branded so as to deceive or mislead the purchaser." Par. 4 says it shall be deemed to be misbranded "if the package containing it, or its labels, shall bear any statement, design, or device regarding the ingredients or the substance contained therein, which statement, design, or device shall be false or misleading in any particular." In this paragraph the false or misleading statement applies only to the ingredients or substance of the article, but the language used emphasizes that the object of the law was to prevent the purchasing public from being misled or deceived in the sale and distribution of food products. Par. 1 says

an article shall be deemed to be misbranded "if it be an imitation of or offered for sale under the distinctive name of another article." The general purpose, as well as the explicit prohibitions of the law, is to be determined from these statutory provisions.

These provisions have been often considered by the courts. The food & drug act, although penal in its nature, is not given a strict construction, but one which will reasonably tend to accom-
24 plish its general object and purposes. U. S. vs. Antikamnia Co., 231 U. S. 654, 665, 666; Frank vs. U. S. (6 C. C. A.) 192 Fed. 866, 869–70. All the words and terms used therein should be given their proper and usual signification and effect. U. S. vs. Lexington Mill Co., 232 U. S. 399, 409–10. The courts take judicial notice of the usual meaning and definition of familiar words. Nix vs. Hedden, 149 U. S. 304. As regards misbranding, Mr. Justice Day, in U. S. vs. Lexington Mill Co., supra, says: "The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality." In U. S. vs. Antikamnia Co., supra, 231 U. S. 654, Mr. Justice McKenna, at p. 665, says: "The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it." Numerous Circuit Court of Appeals and District Court cases have been decided, declaring the same rules and emphasizing more particularly that the prohibition of misbranding is designed to prevent deceiving or misleading the purchasing public, even though the article sold is in itself equally good or not injurious to health. See Brina vs. U. S. (2 C. C. A.), 179 Fed. 373; Frank vs. U. S. (6 C. C. A.), 192 Fed. 866, 869–70; U. S. vs. Tepee Apples (D. C.), 179 Fed. 985; U. S. vs. Scanlon (D. C.), 180 Fed. 485; U. S. vs. 10 Barrels of Vinegar (D. C.), 186 Fed. 399; U. S. vs. 100 Barrels of Vinegar (D. C.), 188 Fed. 471. The decisions of State courts under pure food laws of similar character, are to the same effect. See People vs. Girard, 145 N. Y. 105; People vs. Niagara Fruit Co., 77 N. Y. S. 805, affirmed, 173 N. Y. 629; People vs. Douglas Packing Co., 194 N. Y. S. 633. Such, in brief outline, are the rules of law applicable to this controversy.

Claimant's label does, in my opinion, tend to mislead and deceive the ordinary purchaser and user of vinegar. Cider is defined by Webster as "the expressed juice of apples." By the word "expressed" is meant expelled or forced out. From time immemorial apple cider has been understood to mean the expressed juice of fresh apples and not of dried apples. Apple vinegar or apple cider vinegar likewise in the popular mind has from time immemorial been understood as meaning vinegar produced from apple cider thus defined. Claimant's label conveys the impression that this
25 vinegar is made from that kind of apple cider and that this apple cider is made in the common and familiar way from

fresh or undried apples. The mere fact that the words "apple cider" and "selected apples" are brought together in the same label, conveys unmistakably this impression and repels any other or different impression. Apple cider is a well-known product. Apples are a well-known fruit. Cider means nothing else to the ordinary mind than the expressed juice of fresh and undried apples. Apples mean nothing else to the ordinary mind than fresh and unevaporated apples. A merchant who advertises and offers apples for sale could not compel a purchaser to accept dried or evaporated apples. The latter are not apples as that word is understood in the trade or by a person of ordinary intelligence, but are a manufactured product, an entirely different article. Nor, in my opinion, could a merchant who offers apple cider for sale, compel a purchaser to accept a liquid made from evaporated apples in the manner above described, even though it does possess substantially the same chemical constituents and has substantially the same taste as the expressed juice of fresh apples. Claimant's label consequently misleads and deceives. It makes a statement with respect to an article of food which conveys the false notion that this article is vinegar made from the expressed juice of fresh apples.

Claimant earnestly contends that its product is vinegar because it conforms to the chemical tests prescribed for vinegar by circulars of the United States Department of Agriculture, No. 13, 17, 19, and 136. It also contends that it is made from apple cider because apple cider is only the juice of apples, and that its process first merely extracts the surplus water, and later restores it, and hence the resulting liquid obtained by pressure is apple juice or apple cider, even if it is not the expressed juice of fresh apples. This being so, it further contends that the board of food & drug inspection provided by the pure food & drug act, have no power under the law to declare, as it did, by Food Inspection Decision 140, that vinegar made from dried or evaporated apples is not entitled to be called vinegar without further designation. It may be admitted that this board has no power to add to or to take from the law. It does not, however, follow that claimant's label is true and does not tend to mislead or deceive, or that what the Government is complaining of is not misbranding but a process of making apple cider and apple cider vinegar. Claimant's argument overlooks certain mate-
26 rial and controlling considerations. One is that apple cider as defined in the dictionaries and as commonly and popularly understood, is the expressed juice of fresh apples, and that apple vinegar is commonly and popularly understood to be produced by the alcoholic and acetic fermentation of that kind of cider. Another is that the law was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and that therefore the test of misbranding is the effect of the label or statement upon the ordinary purchaser. A statement that an article is apple cider vinegar made from selected apples can convey no other idea

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to such a person in the present state of common knowledge than that the vinegar is made from the expressed juice of fresh apples and not by the manipulation of dried or evaporated apples. If it does, and the ordinary purchaser is or may be thereby misled or deceived, it is no answer to say that he gets a vinegar which is equally good. The object of the law is to let the purchaser know just what he is buying and to let him decide whether he wants it or not. One may not take advantage of his prejudices or want of information to sell him something different from what he thinks he is buying.

Several authorities have been cited which, while involving facts somewhat different, tend to support my conclusion. Claimant's label was under consideration recently in People vs. Douglas Packing Co., 194 N. Y. S. 633. The decision was upon demurrer and is not a final adjudication of any point in controversy, but the reasoning of the opinion impresses me as sound. The New York statute defines cider vinegar and apple vinegar as a product made exclusively from the pressed juice of apples, by alcoholic and subsequent acetic fermentation. These terms, it is said, should be taken in their ordinary and familiar meaning. It is further said: "The statutory definition of 'cider vinegar' and 'apple vinegar' means by this test vinegar made from apple cider. Even if those terms had been undefined in the statute, they nevertheless would have had in the popular mind a well-defined meaning, in that apple cider is known in every household, and cider vinegar is known to be made from it, though the chemical processes by which the one becomes the other are generally unknown. Other vinegars may be perfectly harmless, chemically undistinguishable, it may be, but calculated to deceive, if marketed under a false label. The popular notion of cider vinegar and
27 the ordinary and obvious meaning attached to the words, exclude the notion of making this common article of domestic use from cider pressed from dried apples. The statute is designed to enable consumers to get what they believe they are getting under the labels 'cider vinegar' and 'apple vinegar'." In U. S. vs. 100 Cases of Tepee Apples, McPherson, District Judge, held that canned Arkansas apples and blackberries were misbranded because the label on the cans gave Michigan cities as the place of manufacture, thereby conveying the misleading impression that the apples and blackberries were Michigan fruit. It was contended that Michigan apples and blackberries were superior in quality to the Arkansas fruit, but this consideration was disregarded as immaterial, Judge McPherson saying: "The other purpose (of the law) was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view, it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them, he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will

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buy and which he will receive and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments." In Brina vs. U. S. (2 C. C. A.) 179 Fed. 373, cottonseed oil was labeled in large Italian letters "oil for salad" and in small English letters "cotton salad oil extra quality"; and this was held to be misbranded. The trial judge, without evidence, charged the jury that "as a notorious fact salad oil prima facie means olive oil" and that misbranding resulted, unless evidence were produced to show a different meaning in the trade. This ruling was assigned as error. In the opinion of the Circuit Court of Appeals it is pointed out that salad oil is defined as olive oil in Worcester's, Stormont's Imperial, Encyclopedia, and Century Dictionaries, and that no error was committed in thus charging. Compare U. S. vs. 10 Barrels of Vinegar (D. C.) 186 Fed. 399; U. S. vs. Scanlon, 180 Fed. 485; Frank vs. U. S. (6 C. C. A.) 192 Fed. 866, 869–70.

Upon authority, as well as upon principle, it must be held
28 that the charge of misbranding is sustained. The label does bear statements regarding the article and the ingredients or substance thereof which are false and misleading, and the vinegar must be held to be offered for sale under the distinctive name of another article as that name is popularly and commonly understood. Judgment of forfeiture and condemnation will be entered.

D. C. WESTENHAVER,
Judge.

November 1, 1922.

In United States District Court.

Journal entry of judgment.

Entered Nov. 13, 1922, by D. C. Westenhaver, Judge.

The parties, by their attorneys come, a jury trial having been waived in writing, and submit this cause to the court on the pleadings and an agreed statement of facts, which facts are hereby found by the court to be the facts of this case; on consideration whereof, the court, being fully and duly advised in the premises, finds on the issues joined that the ninety-five barrels, more or less, of vinegar seized herein were shipped in interstate commerce by claimant, Douglas Packing Company, from Fairport, New York, to Fisher Brothers, Cleveland, in the State of Ohio, Northern District of Ohio, Eastern Division, via the New York Central Railroad Company, a common carrier engaged in carrying freight from one State of the United States to another State of the United States, particularly from said Fairport, New York, to said Cleveland, Ohio; that said ninety-five barrels of vinegar, more or less, were seized while in the possession of said Fisher Brothers, at Cleveland,

in the said State and district, as aforesaid, and within the jurisdiction of the United States and of this court.

29 The court further finds that all of the allegations of the libel respecting charges of misbranding are true and correct and that said ninety-five barrels of vinegar, more or less, seized are misbranded, contrary to and in violation of general paragraph of section eight and paragraphs first, second, and fourth of section eight of the provisions of the act of Congress approved June 30, 1906, commonly known and designated as the food and drugs act, as charged and set forth in said libel.

The court further finds that the allegations of said libel respecting the charge of adulteration, within the meaning of paragraph first, under food, of section seven of said food and drugs act, is unsupported. The charge in respect to adulteration, in violation of paragraph second, under food, of section seven of said act, no finding is made.

Therefore, it is ordered, adjudged, and decreed that said ninety-five barrels of vinegar, more or less, with their contents, be and the same are hereby, declared to be misbranded, in violation of general paragraph of section eight and paragraphs first, second, and fourth of section eight of the provisions of the act of Congress approved June 30, 1906, commonly known and designated as the food and drugs act, as charged and set forth in said libel.

And it is further ordered, adjudged, and decreed that said ninety-five barrels of vinegar, more or less, labeled and branded as in said libel set forth, be and the same are hereby condemned and forfeited as prayed for in said libel and as provided for in said act of Congress, and the United States marshal for the Northern District of Ohio is hereby ordered and directed to sell, within twenty (20) days of the date hereof, the said ninety-five barrels of vinegar, more or less, under such terms and conditions as are not in violation of said food and drugs act; provided, however, that in the event of the United States marshal being unable to dispose of said vinegar by sale, as herein provided, then the said marshal is hereby ordered and directed to dispose of said vinegar by destruction, under such terms and conditions as are provided and approved in said act.

And it is further ordered that if said vinegar be disposed of, as herein provided, then the proceeds thereof shall be deposited and disposed of as provided by said food and drugs act.

30 It appearing to the court, however, that said ninety-five barrels of vinegar, more or less, may be relabeled in such manner as to render the shipment thereof not in violation of the said food and drugs act or contrary to the laws of any State, Territory, or insular possession.

It is, therefore, further ordered, adjudged, and decreed that, upon the payment of the costs of the libel proceedings herein and upon the execution and delivery to libelant by claimant, Douglas Packing

Company, of a good and sufficient bond in the sum of one thousand dollars ($1,000.00), conditioned that said ninety-five barrels of vinegar, more or less, labeled and branded as aforesaid in said libel, shall not be sold or otherwise disposed of, contrary to the provisions of said act or to the laws of any State, Territory, or insular possession, the marshal shall redeliver and surrender the ninety-five barrels of said vinegar, more or less, so labeled and branded as set forth in said libel, to said Douglas Packing Company, in lieu of disposing thereof by sale as aforesaid.

Claimant, Douglas Packing Company, excepts to such finding, judgment, and order of forfeiture and condemnation.

The motion by claimant, Douglas Packing Company, to set aside the finding, judgment, and order of forfeiture and condemnation and for a new trial is heard and refused, to which ruling claimant, Douglas Packing Company, excepts.

In United States District Court.

Motion by claimant, Douglas Packing Company, for a new trial.

Filed Nov. 13, 1922.

Now comes the claimant, Douglas Packing Company, by White, Cannon, and Spieth, its attorneys, and moves the court to set aside the finding, judgment, and order of forfeiture and condemnation entered herein, and for a new trial, and for cause of said motion, says:

31 (1) That the finding of the court, judgment, and order entered herein is not sustained by the evidence.

(2) That the finding of the court, judgment, and order entered herein is contrary to law.

(3) That the finding of the court, judgment, and order entered is in favor of libelant, when it should have been in favor of claimant.

WHITE, CANNON & SPIETH,
Attorneys for Douglas Packing Company, Claimant.

In United States District Court.

Order withdrawing claimant's exhibit.

Entered Nov. 13, 1922, by Judge Westenhaver.

It being represented to the court that claimant's, Douglas Packing Company, exhibit, consisting of sample bottles of cider, sweet and fermented, and vinegar, filed in this cause cannot be conveniently duplicated, it is ordered by the court that said exhibit be withdrawn from the files of this court and forwarded to the clerk of the United States Circuit Court of Appeals for the Sixth Circuit, with the transcript of record in this cause, for use at the hearing of this cause in said Circuit Court of Appeals.

In United States District Court.

Petition for writ of error.

Filed Nov. 13, 1922.

Now comes Douglas Packing Company, claimant herein, by its attorneys, White, Cannon and Spieth, and says that on or about the 13th day of November, 1922, this court entered a finding, judgment, and order of forfeiture and condemnation herein in favor of
32 the libelant and against the defendant, ninety-five barrels, more or less, alleged apple cider vinegar, and claimant, Douglas Packing Company, in which finding, judgment, order of forfeiture and condemnation, and the proceedings had thereto in this cause, certain errors were committed to the prejudice of said defendant and this claimant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this claimant prays that writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Sixth Circuit for the correction of errors so complained of and for such other and further relief in the premises as may be just, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

WHITE, CANNON & SPIETH,
Attorneys for Claimant, Douglas Packing Company.

In United States District Court.

Assignment of errors.

Filed Nov. 13, 1922.

Now comes the Douglas Packing Company, claimant in this action, and in connection with its petition for a writ of error, assigns the following errors in the trial and finding, judgment, and order of forfeiture and condemnation of said District Court in said cause, as follows:

(1) Said court erred in that the finding, judgment, and order of forfeiture and condemnation of the court entered herein is not sustained by the evidence.

33 (2) Said court erred in that the finding, judgment, and order of forfeiture and condemnation of the court entered herein is contrary to law.

(3) Said court erred in that the finding, judgment, and order of forfeiture and condemnation was entered against claimant, whereas the finding and judgment ought to have been rendered in favor of claimant and against the libelant.

(4) Said court erred in overruling claimant's motion to set aside the finding, judgment, and order of forfeiture and condemnation, and for a new trial.

(5) For other errors manifest and apparent upon the record.

Wherefore, claimant prays that said finding, judgment, and order of forfeiture and condemnation may be reversed.

WHITE, CANNON & SPIETH,
Attorneys for Claimant, Douglas Packing Company.

In United States District Court.

Order allowing writ of error.

Entered Nov. 13, 1922, by D. C. Westenhaver, Judge.

This 13th day of November, 1922, came the claimant, Douglas Packing Company, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings, and papers upon which the finding, judgment, and order of forfeiture and condemnation herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the claimant giving bond, according to law, in the sum of five hundred dollars ($500.00), which shall operate as a supersedeas bond.

34 *Bond on writ of error or appeal for $500.*

Approved and filed Nov. 13, 1922.

[Omitted in printing.]

35 In United States District Court.

Writ of error.

Filed Nov. 13, 1922.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States, to the honorable the Judge of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before

you, or some of you, between the United States of America, plaintiff, against Ninety-five barrels, more or less, alleged apple cider vinegar, defendant, and Douglas Packing Company, claimant, a manifest error hath happened, to the great damage of the said Douglas Packing Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the * 13th day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

36 Witness the Honorable William Howard Taft, Chief Justice of the United States, the 13th day of November, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States of America the one hundred and forty-seventh.

[SEAL.]

B. C. MILLER,
Clerk of the District Court of the United States for the Northern District of Ohio.
By M. E. BAUMAN,
Deputy Clerk.

Allowed by
D. C. WESTENHAVER,
Judge of the District Court.

37–38 *Citation in usual form showing service on Gerard J. Pilliod.*

[Omitted in printing.]

39 In United States District Court.

Stipulation re certification of record.

Filed Nov. 13, 1922.

In accordance with section 7 of rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer, may be certified by the clerk as required by law and the rules of the appellate court, as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this

* Not exceeding 30 days from the day of signing the citation.

cause, as set forth in the precipe for transcript, without further comparison by the clerk.

GERARD J. PILLIOD,
Asst. U. S. Atty.,
Attorney for Libelant.
WHITE, CANNON & SPIETH,
Attorneys for Claimant.

40 In United States District Court.

Precipe for transcript.

Filed Nov. 13, 1922.

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above-entitled cause, and include therein the following papers and orders:

Title page.
Caption.
Libel.
Claim of Douglas Packing Co.
Answer of Douglas Packing Co.
Application to withdraw answer.
Order granting motion to withdraw answer.
Demurrer.
Opinion of court on demurrer.
Order overruling demurrer.
Agreed statement of facts.
Answer refiled.
Stipulation waiving trial to jury.
Order directing that exhibit of claimant be placed in cold storage.
Opinion.
Journal entry.
Motion for a new trial.
Order withdrawing claimant's exhibit.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Bond on appeal.
Writ of error.
Citation.
Stipulation as to printing record.
Precipe for transcript.
Clerk's certificate.

And deliver all papers to the Gates Legal Publishing Company for printing.

WHITE, CANNON & SPIETH,
Attorneys for Claimant, Douglas Packing Co.

41 In United States District Court.

Certificate of clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, clerk of the District Court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full, true, and complete copy of the final record, including the petition for writ of error, assignment of errors and bond on writ of error, and all proceedings in said cause, in accordance with the praecipe for transcript filed by plaintiff in error, the originals of which, except a certain exhibit withdrawn by leave of court, are now in my custody as clerk of said court.

There is also annexed to and transmitted with such transcript of record the writ of error and the citation issued and allowed in this case.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district, this 16th day of November, A. D. 1922, and in the 147th year of the Independence of the United States of America.

B. C. MILLER,
Clerk.

[SEAL.] By M. E. BAUMAN,
Deputy Clerk.

42 Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

Motion to advance cause.

Filed Nov. 17, 1922.

Now comes plaintiff in error, by White, Cannon and Spieth, its attorneys, and moves the court for an order to advance the within case for hearing in January, and for cause thereof says:

The question involved arises under the pure food and drugs act, and relates to the labeling of vinegar made from evaporated and unevaporated applies.

In the District Court of the United States for the Northern District of Ohio, Eastern Division, there are ten pending cases; in the District Court at Columbus and Cincinnati there are several similar cases; and in various other District Courts of the United States there are about fifty cases, all involving the same question, which are dependent upon the final determination of the within case.

43 Plaintiff in error is one of the largest manufacturers of vinegar in the United States, and until the present controversy in regard to the labeling of vinegar is settled it is very seriously handicapped in the manufacture and distribution of its product. Other manufacturers are in the same situation. The dis-

tributors of vinegar and the purchasing public are also much interested in having this question of labeling finally determined.

The question involved is, therefore, of general interest and an early hearing of this case will not only assist in disposing of a large number of pending cases, but will also be of great benefit and relieve an uncertainty which now exists in the vinegar trade.

WHITE, CANNON & SPIETH,
Attorneys for Plaintiff in Error.

Consent is hereby given for the granting of the above motion.

GERARD J. PILLIOD,
Asst. United States District Attorney for Defendant in Error.

November 16th, 1922.

44 United States Circuit Court of Appeals for the 6th Circuit.

Order advancing cause for hearing.

Filed Nov. 17th, 1922.

This cause is advanced and assigned for hearing at the January session, 1923.

United States Circuit Court of Appeals for the 6th Circuit.

Appearance of counsel.

Filed Nov. 20, 1922.

ARTHUR B. MUSSMAN,
Clerk of said court:

Please enter my appearance as counsel for the plaintiff in error.

WHITE, CANNON & SPIETH.

United States Circuit Court of Appeals for the 6th Circuit.

Order continuing cause.

Filed Jan. 8th, 1923.

This cause is continued until the February session pursuant to stipulation of counsel.

45 United States Circuit Court of Appeals for the 6th Circuit.

Order granting leave to file amicus curiae.

On application of Mr. Judson Harmon leave is granted to file brief as amicus curiae.

United States Circuit Court of Appeals for the 6th Circuit.

Cause argued and submitted.

February 6th, 1923—before Knappe, Denison, and Donahue, JJ.

This cause is argued by Mr. L. C. Spieth on behalf of the plaintiff in error and is submitted on brief on behalf of the defendant in error.

United States Circuit Court of Appeals for the 6th Circuit.

Judgment.

Filed April 3, 1923.

Error to the District Court of the United States for the Northern District of Ohio. This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

46 On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this court. In accordance with paragraph 2 of rule 27, no costs are allowed.

United States Circuit Court of Appeals for the 6th Circuit.

Opinion.

Filed April 3, 1923.

47 [Title omitted.]

DONAHUE, *Circuit Judge:*

The United States filed a libel in the District Court for the seizure and condemnation of ninety-five barrels of alleged apple cider vinegar, labeled "Excelsior Brand apple cider vinegar made from selected apples," charging that this vinegar is both adulterated and misbranded in violation of the food and drugs act of June 30, 1906. The Douglas Packing Company, the manufacturer and owner of this vinegar, intervened and denied that it was either adulterated or misbranded and asked restitution.

A written waiver of trial by jury was filed and the case was submitted to the court upon an agreed statement of facts. The

48 trial court found that the vinegar was not adulterated, but was misbranded in violation of general paragraph of section 8 and subparagraphs 1, 2, and 4 as to foods of section 8 of the

food and drugs act of June 30, 1906, as charged in said libel and ordered its condemnation and forfeiture as provided by that act.

It appears from the agreed statement of fact that claimant, the Douglas Packing Company, is engaged in the manufacture of apple cider and apple cider vinegar; that during the apple season, from about September 25th to December 15th of each year, sound, mature, unevaporated apples are used by it in the manufacture of its products, and for the balance of the year evaporated apples of like quality are used.

The principal result of the evaporation process is the removal of 80% of the water contained in the natural fruit. While it is not admitted that there are no other constitutents of the apple removed by this process, yet it is admitted, in effect, that if any other constituents are removed by evaporation, the amount thereof is so negligible that the science of chemistry is unable to determine that fact. When the apple season is over and the evaporated apples are used by the claimant, in the manufacture of its products, substantially the same amount of pure water is added to the evaporated apples that was removed by the evaporating process. In all other respects the claimant employs the same receptacles, equipment, and process as in the manufacture from the unevaporated apple.

In the evaporating process small quantities of sulphur fumes are used to prevent rot, fermentation, and decomposition. This is wholly removed therefrom by the addition of barium carbonate, or some other chemical that eliminates itself and the sulphur compound by precipitation. After fining (clarifying) and filtration the cider or liquid obtained from the evaporated apple, upon chemical analysis, will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except a trace of barium—in other words, an amount too small to be quantitively measured. No claim is made that this trace of barium renders the product injurious or deleterious to health, and, except for this trace of barium, the vinegar made from this cider or liquid obtained from the evaporated apple is similar in taste and composition to the vinegar made from the cider of the unevaporated apples.

49 It was evidently the purpose and intent of the Government and the claimant, in subscribing to the agreed statement of facts, to eliminate from consideration all unimportant matters and confine the issues to important basic questions affecting the substantial rights of the parties. These issues must be determined solely upon consideration of the facts admitted, regardless of the possibility that facts might have been established by evidence, at variance therewith and more in harmony with a supposed public opinion upon this subject.

The libel charges that this vinegar is adulterated in violation of paragraphs 1 and 2, under food, of section 7 the food and drug act of June 30, 1906, which paragraphs read as follows:

"1. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength."

"2. If any substance has been substituted wholly or in part for the article."

It is clear that this trace of barium, which is admitted to be neither injurious or deleterious, does not constitute adulteration within the meaning of either of the paragraphs of section 7 of the food and drug act above quoted. U. S. v. Lexington Mill and Elevator Co., 232 U. S. 399.

The question whether some other substance has been substituted wholly or in part for the article known as "apple cider vinegar" in violation of the second paragraph of this section will be considered and discussed in connection with the charge of misbranding.

It is insisted, however, upon the part of the Government that the barrels are also labeled "Guaranteed to comply with all pure food laws"; that this means not only the Federal food and drug act, but also the pure food laws of the State where this vinegar is intended to be sold at retail, after it passes beyond the jurisdiction of the Federal authorities. The libel, however, is based solely upon the adulteration and misbranding of this vinegar in violation of the Federal food and drug act. While it is alleged that the vinegar was shipped from Fairport, N. Y., to Fisher Brothers, Cleveland, Ohio, there is no allegation that the vinegar is to be sold in the State of Ohio or that it is adulterated or misbranded in violation of the Ohio Statutes, nor is there anything in the agreed statement
50 of facts in reference to its final destination and place of sale at retail.

If, however, it were conceded that this libel could be construed as charging that this vinegar is adulterated or misbranded in violation of the terms and provisions of the Ohio law, the same result must follow. Substantially the same questions are presented under the Ohio Statute (sec. 5789, G. C.) in reference to misbranding, as are presented under the Federal food and drug act, which questions will be discussed later in this opinion. Upon the question of adulteration under the Ohio law, no claim is made that this vinegar contains less than 4% by weight of absolute acetic acid, nor is a mere trace of barium, which is neither deleterious or injurious to health, a "foreign substance" within the contemplation, intent or purpose of sec. 5786 of the General Code of Ohio. U. S. v. Lexington Mill and Elevator Co., supra.

Section 8 of the food and drug act provides, among other things, that, in a case of foods, an article shall be deemed to be misbranded if it be labeled or branded so as to deceive or mislead the purchaser, or it be an imitation of, or offered for sale under the distinctive name of another article.

The important question in each case is whether the product is the identical thing that its brand indicates. If it is the identical thing indicated by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant.

It appears from the agreed statement of facts that the cider from which this vingear was made, was manufactured from apples and from nothing else. The process of its manufacture differed from the usual method only in so far as necessary to preserve the fruit. This was accomplished by the evaporation process above described. When a quantity of water equal to the amount evaporated is added to the evaporated apples and pressed therefrom it combines with and carries the solvent properties of the apples just the same as in the original state, or if not exactly and identically the same, so near as to defy the science of chemistry to discover the difference. This is the full scope and effect of the dehydrating process as appears by the agreed statement of fact.

The conservation of our food products is of some concern to the public and, perhaps, second in importance only to the demand
51 for pure and unadulterated food. It is perfectly apparent that the apple season is altogether too short for the economical manufacturing of the crop, during the season, into cider vinegar in sufficient quantities for public consumption. Therefore an efficient and harmless method of preserving the fruit until it can be used for this purpose is in the direct interest of the public, and if this method has accomplished that object without change in the product, it should be encouraged rather than condemned.

If, after cider has been pressed from unevaporated apples, a large amount of the water that is a constituent part thereof, is evaporated therefrom and later an equal amount of water is added thereto, the constituent elements of cider yet remains and it would hardly be contended that vinegar made therefrom would not be apple cider vinegar, yet so far as the agreed statement of facts discloses, there is substantially no difference between the evaporation of water from the cider and evaporating the water from the apple before the cider is pressed therefrom. The water is not all evaporated, leaving only a hard dried fruit, as may approximately result from sun drying; 20% of the water remains and this continues to be the condensed juice of the fruit ready for restoration by pure water dilution to its original volume. This was the underlying idea of the Allen patent, No. 268,972, for a dry mince pie compound, in which it appears that the water was evaporated from the apple for the purpose, as stated by the patentee, " so that I have the cider in my compound without useless water, which may be added when the consumer wishes to use it." Dougherty v. Doyle, 63 Fed. 475.

It must also be assumed that legislation upon any subject has some definite and substantial object in view, and is not in furtherance of technical purposes or barren idealities. It was declared by the Supreme Court in U. S. v. Lexington Mill and Elevator Co., 232 U. S. 399, that the primary purpose of Congress in enacting the food and drug act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food. That case involved the manufacture of flour by a new process, called the "Alsop process," and while the charge

there was adulteration, by adding to articles of food consumption, poisonous and deleterious substances, a much more serious matter than misbranding, yet the court held that in order to condemn
52 a food product upon the ground that it is adulterated it is incumbent upon the Government to establish the fact that the added substances may render the article injurious to health. This conclusion was reached evidently upon the theory that the legislative intent was to accomplish a substantial and beneficial result to the public and not merely for the purpose of exercising an arbitrary control over private business.

It is undoubtedly true that vinegar not made from apple cider, even though chemically equal to cider vinegar, may not be branded as such. On the other hand, vinegar made from apple cider is not misbranded by reason of its failure to meet the chemical test.

Misbranding is included in the statutory prohibition because it bears some relation to the conservation of the public health and not primarily because a purchaser's whims were to be protected: and, though doubtless the test of misbranding a product is whether it is true to name, there is no occasion for overstrictness in applying this test in a case where the public health can not possibly be jeopardized.

In the Standard Encyclopedia, under the caption, "Cider," it is said, "Apples commonly used for making cider are by no means tempting to the palate and are, in fact, unfit for eating raw or ordinary cooking. * * * In the United States it is considered that a certain proportion of decay in fruit improves the flavor." Keeping in mind the underlying purpose to protect the public health and the admissions in this case that the present article is made wholly from "sound and mature apples, free from rot and ferment," it is clear that condemnation should not be made unless the statute imperatively requires it.

Definitions of cider, which include the method or process of its manufacture, written long before public needs required the conservation of our food products, are not helpful to the determination of the question presented in the instant case. Even these definitions call only for the juice of apples, and do not literally exclude the pressing of apples dehydrated and later hydrated in equivalent proportions. The missing and essential element for the Government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. The danger of reliance on judicial knowledge founded on past impressions is well illustrated by the salad oil cases. The very
53 branding which the court, in Brina v. U. S., 179 Fed. 373, said it judicially knew was so untrue as to compel the conclusion of misbranding, two years later, was shown to the same court in Von Bremen v. U. S., 192 Fed. 904, to be so true as to require an instructed verdict for the respondent. In the present case it is conceded that this identical product has been sold and accepted by the trade under this name in great quantities for many years and with-

out challenge until now. While there is nothing in the agreed statement of facts to show how far this acceptance has been with knowledge, yet the court can not judicially know that this acceptance was so wholly without knowledge of the facts as to be unimportant.

It is not seriously contended on the part of the Government that the fluid obtained from pressing the evaporated apples, after the water taken therefrom has been restored, is not apple cider. It is suggested that possibly there is some constituent element of the apple removed by the dehydrating process that is never restored thereto. There is no proof of that fact, but there is an admission that even if such consistituent element is removed it is so immaterial and inconsequential in quantity that the science of chemistry can not disclose it. This brings this case clearly within the doctrine announced in U. S. v. Lexington Mill and Elevator Co., supra, to the effect that the burden is upon the Government to establish by the evidence, not merely a technical, but a substantial violation of the Federal food and drug act, which may render the article injurious to health or mislead the public to its prejudice or harm or induce the purchase of a different article than the article desired.

Nor should the fact be overlooked that this is a highly penal statute. The Government in this proceeding is asking the condemnation and forfeiture of ninety-five barrels of vinegar because it is adulterated and misbranded and the burden is upon the Government to establish one or both of these alleged facts.

While the Government is practically conceding in the agreed statement of facts that the liquid obtained from evaporated apples by this method is apple cider, identical in taste, substance, and chemical test with apple cider pressed from the unevaporated apples, except that there may, perhaps, be some constituent element lacking, the quantity, if any, being so small that its absence is not shown by chemical tests, and further conceding that the same has been sold upon the market for many years as apple cider, and that
54 vinegar made therefrom has been an article of commerce, at least since January 1, 1906, under the name and brand of apple cider vinegar and sold in quantities by this one manufacturer alone, aggregating 100,000 barrels a year; nevertheless, it is now insisting that the branding of this product as apple cider vinegar is calculated to deceive and mislead the purchaser into buying an article other than the brand implies.

It may be true that a large part of the purchasing public has no knowledge whatever in reference to the manufacture of cider from evaporated apples and for that reason might have a distinct prejudice against such a method of manufacture. Undoubtedly the pure food and drug act contemplates the protection of the public in this regard, but only to the extent that the public shall not be deceived or misled by the brand into buying an imitation of the article or a substitute for the article indicated by the brand. If, however, it is in truth and in fact buying the identical article indicated by the brand, manufactured from the same basic elements and none other.

the purpose of the statute is accomplished and the process of manufacture is of no importance.

A substantial, if not an exact analogy, may be found in the manufacture of maple syrup. The water is partially evaporated from the sap of a maple tree in order to produce maple syrup. If the evaporation process is continued until sufficient of the water is evaporated, the product is maple sugar. If to this sugar there is added as much water as was evaporated therefrom in the process of reducing maple syrup to maple sugar, and the sugar is dissolved and held in solution, the product again becomes maple syrup. It has been held by the pure food department (Circular 136) that maple syrup manufactured in this way may be properly branded "Maple syrup."

Yet, notwithstanding such syrup responds to the chemical tests, and doubt might be suggested that possibly a constituent element was removed from the maple syrup in the process of reducing it to maple sugar that could not be wholly restored thereto. It is also possible that there might be a popular prejudice against maple syrup manufactured in this way, yet it would hardly be contended that Congress is expending its time in the enactment of laws in furtherance of perpetuating prejudices founded upon mistake and misunderstanding and at war with the conceded facts of the case.

55 Another illustration may test the soundness of the proposition that there is a misbranding of this vinegar. Cream is a substance which, by the unaided process of nature, rises to the top of milk. A generation or two ago this would have been the popular definition. The process of its development was well known and required, at the least, some hours of time and favorable conditions. Then it was discovered that the butterfat can be separated from the milk in a few minutes by a centrifugal separator and that the product is really cream; yet it is at least probable that for some time a substantial part of the public would have refused to buy butterfat in this form unless it had been labeled "cream" and without disclosing the substitution of artificial for natural methods. So the catalogue of present-day foods and those that may fairly be developed will disclose frequent instances of great change in methods of manufacture, or treatment, without any resulting necessity of changing the name of the product.

We get no controlling direction from the decided cases. The salad-oil cases have been mentioned. In the Vinegar Case, 186 Fed. 399, the product was in fact distilled vinegar with a dash of apple cider. It was labeled as a blend of cider vinegar and distilled vinegar. From the view that the court took of the meaning of the label the misbranding was obvious.

In the Tee Pee Apple Case, 179 Fed. 185, the label was considered to mean that the apples were grown in Michigan, and this became a geographical misrepresentation expressly forbidden by the act.

We do not overlook that the New York Supreme Court and the United States District Court for the Eastern District of Wisconsin

have held that claimant's vinegar is misbranded. In each case the opinion seems to be based in part upon inferences and testimony not presented by this record and in part upon judicial knowledge that nothing is apple cider unless it is pressed from fresh apples—an inference wholly inconsistent with the facts here conceded.

For the reasons above stated a majority of the court is of the opinion that the judgment of the district court is not sustained by the agreed statement of facts. The judgment is reversed and cause remanded for further proceedings in accordance with this opinion.

56 In the United States Circuit Court of Appeals, Sixth Circuit.

[Title omitted.]

Petition for rehearing.

To the honorable the United States Circuit Court of Appeals for the Sixth Circuit:

Your petitioner, the United States of America, defendant in error, by its attorneys, respectfully prays this honorable court to grant a rehearing of the above-entitled case for the following reasons:

1. Because the judgment and decision of this honorable court filed herein April 3, 1923, is contrary to law;

2. Because the question thereby decided is of very great
57 public importance in the administration and enforcement of the Federal food and drugs act, and the officials of the United States Department of Agriculture, charged by law with the administration of said statute, believe that there are phases of the issue involved which were not presented for consideration to this court at the hearing or in the briefs or the arguments of counsel heretofore considered, and that a rehearing would afford opportunity for a more adequate presentation of the issue from the Government's standpoint and contribute to a correct settlement of said issue in this and in other Federal jurisdictions where the same is now being litigated.

3. Because counsel for the producers of vinegar from evaporated apples were heard in their behalf amicus curiae in opposition to the Government's contentions; while counsel for producers of vinegar from unevaporated apples, owing to lack of seasonable notice of the time of hearing this case, was unable to apply to this court for a like opportunity to be heard amicus curiae in behalf of the Government's contentions.

4. Because there are trade and economic problems and phases intimately connected with the issue, which due to the aforesaid manner of argument have not been heretofore presented to the court in the briefs and arguments of counsel; and said producers of vinegar from unevaporated apples respectfully submit that their interests

are adversely affected and their business jeopardized by the rendition of this honorable court's decision without a full presentation and discussion of the issue from the standpoint of their important food industry. That in the event that this honorable court shall be pleased to grant a rehearing of this case said producers will be represented by the general counsel of their trade organization, the American Cider and Vinegar Manufacturers' Association, with headquarters at Rochester, New York, who will apply to be heard herein, amicus curiæ.

58 5. Because this honorable court erred by holding and deciding in substance and effect, that the judgment of the District Court was not sustained by the facts stipulated, inasmuch as those facts contained in the stipulation which were material to the issue were alleged in petitioner's libel and were held sufficient upon demurrer, which said ruling of the District Court upon demurrer, though excepted to, is not referred to or overruled in the opinion and decision rendered herein by this honorable court.

6. Because this honorable court erred by failing to sustain the finding of the District Court that the vinegar libelled was not cider vinegar, identical with that vinegar represented by exhibits submitted to said court and conceded to be genuine apple cider vinegar, inasmuch as said finding was a reasonable inference of fact fairly deducible from the admitted facts and not subject to be set aside by this court because it disagreed with said conclusion.

7. Because this honorable court erred by failing to hold and decide that misbranding under the food and drugs act must be determined by construing descriptive words appearing upon labels of food and drug articles according to the ordinary meaning and popular signification of such words to the mind of the purchasing public rather than according to the technical or trade meaning which said words may have acquired among manufacturers and vendors of these commodities.

8. Because this honorable court erred in holding and deciding in substance and effect that the definition of the terms "Apple cider vinegar" in their ordinary and popular signification is not properly a subject of judicial notice.

59 9. Because this honorable court erred in holding and deciding that the definition of the terms, "Apple cider vinegar" judicially noticed by the District Court and applied by said court in the determination of the issue before it, was incorrect in any particular.

10. Because this honorable court erred in holding and deciding in substance and effect upon the pleadings and stipulated facts herein that the trade or technical meaning or any secondary meaning whatsoever of the terms "Apple cider vinegar" was involved as a material issue in this case.

11. Because this honorable court erred in holding and deciding as a matter of law upon the record herein that the ordinary and popular signification of the terms "Apple cider vinegar" could be altered

by the trade practice or usage of manufacturers or vendors of vinegar of labeling vinegar produced from evaporated apples as "Apple cider vinegar," without a disclosure to the purchasing public of the fact that such vinegar was made from evaporated apples.

12. Because this honorable court erred in holding and deciding as a matter of law upon the record herein that the character of raw material used in the production of the vinegar libelled, the chemical treatment to which it was subjected, and the process by which it was manufactured, were negligible factors in determining the commercial identity of the article with the concept of genuine apple cider vinegar, held by the purchasing public.

13. Because this honorable court erred by holding in substance and effect that in order to constitute a misbranding under the Federal food and drugs act the label must be such as to deceive the purchaser of an article of food or drugs to his substantial injury.

14. Because this honorable court erred by holding in substance and effect that it was not the purpose of Congress in legislating against misbranding, to protect ultimate purchasers of articles of food
60 or drugs against deceit, when exercising their right of choice or selection among different brands, grades or varieties of the same commodity, even though the exercise of this choice be governed by whim or prejudice, and not upon considerations of composition and quality.

15. Because this honorable court erred in failing to hold that the vinegar libelled was both adulterated and misbranded within the meaning of the food and drugs act, June 30, 1906.

16. Because this honorable court erred by not affirming the judgment of the District Court in this case.

A. E. BERNSTEEN,
United States Attorney in and for the Northern District of Ohio.
GERARD J. PILLIOD,
Assistant United States Attorney in and for the Northern District of Ohio.
Attorneys for Petitioner.

61 [Jurat showing the foregoing was duly sworn to by A. E. Bernsteen and Gerard J. Pilliod omitted in printing.]

62 United States Circuit Court of Appeals for the 6th Circuit.

Order extending time to file brief as amici curiae.

Filed May 19th, 1923.

Counsel for the producers of vinegar from unevaporated apples are permitted, as amici curiae, to file within fifteen days a brief in support of the Government's petition for rehearing.

Order extending time to file brief as amici curiae.

Filed June 4, 1923.

The time for filing brief on behalf of the producers of vinegar from unevaporated apples, as amici curiae, upon the petition for rehearing herein is hereby extended for a period of ten days.

United States Circuit Court of Appeals for the 6th Circuit.

Order denying petition for rehearing.

Filed June 29, 1923.

The petition for the rehearing of this cause is hereby denied.

63 United States Circuit Court of Appeals for the 6th Circuit.

Order extending time to file petition for rehearing.

Filed April 27, 1923.

Upon application of the United States attorney the time within which to file petition for rehearing is extended to and including the 15th day of May, 1923.

Petition for rehearing.

Filed May 14th, 1923.

64 United States Circuit Court of Appeals for the Sixth Circuit.

Clerk's certificate.

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Ninety-five barrels of vinegar, etc., vs. United States of America, No. 3835, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 26th day of July, A. D. 1923.

[SEAL.] ARTHUR B. MUSSMAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

65 *Writ of certiorari and return.*

Filed Nov. 6, 1923.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Ninety-five barrels, more or less, alleged apple cider vinegar (Douglas Packing Company, claimant), is plaintiff in error, and the United States of America is defendant in error, No. 3835, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

66 Do hereby command that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT, *ss:*

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within-entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 3rd day of November, A. D. 1923, there was filed in my office a stipulation in the above-entitled case in the following words, to wit:

In the Supreme Court of the United States, October Term, 1923.

[Title omitted.]

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
JOHN G. WHITE,
A. V. CANNON,
L. C. SPIETH,
WHITE, CANNON & SPIETH,
Counsel for Respondent.

Oct. 30, 1923.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official signature and the seal of said Circuit Court of Appeals at the city of Cincinnati, Ohio, in said circuit this 3rd day of November, A. D. 1923.

[SEAL.] ARTHUR B. MUSSMAN,
Clerk United States Circuit Court of Appeals, Sixth Circuit.

67 [File endorsement omitted.]

68 [File endorsement omitted.]

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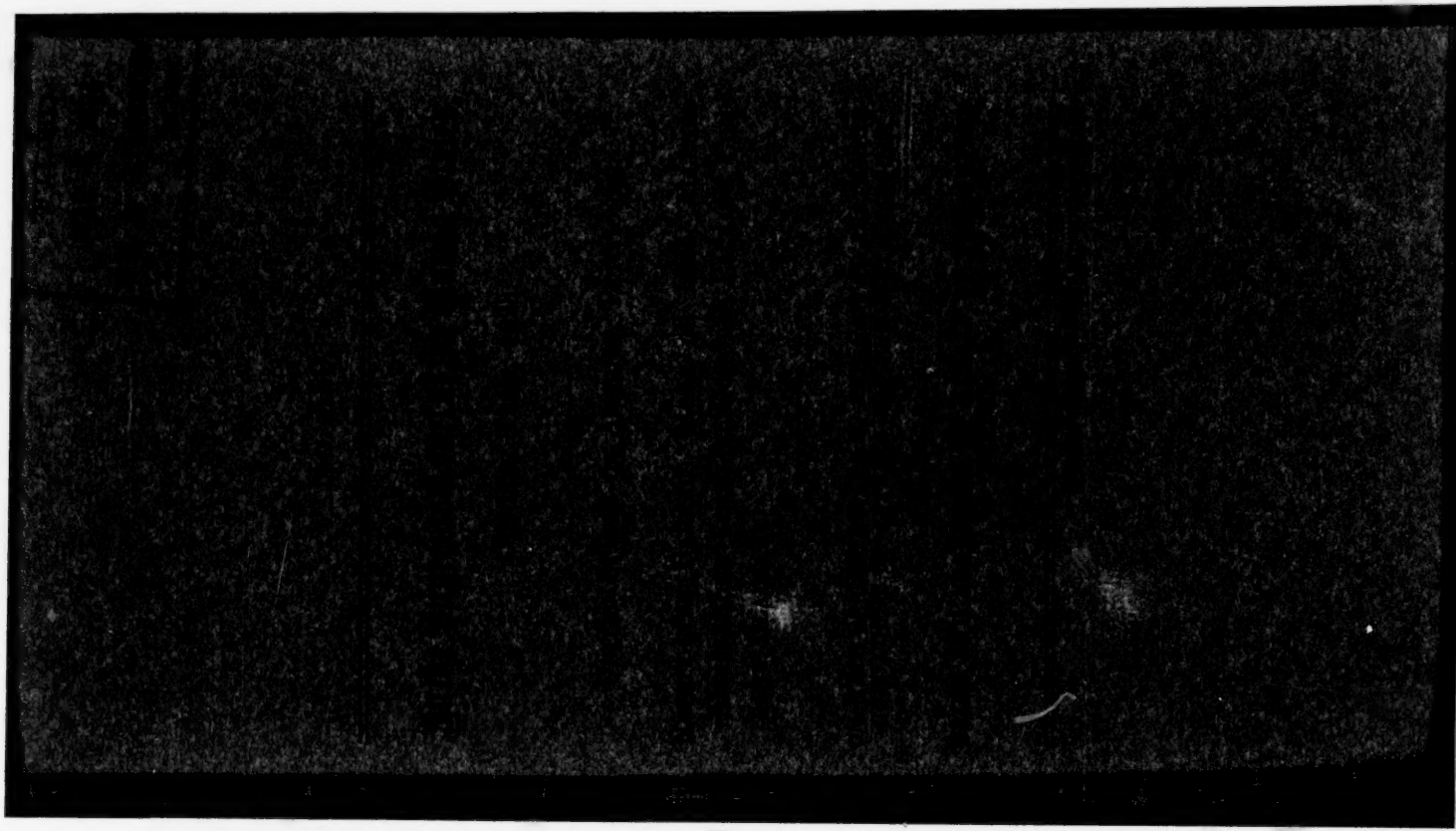

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, PLAINTIFF IN Error,
v.
NINETY-FIVE BARRELS, MORE OR LESS, Alleged Apple Cider Vinegar, Douglas Packing Company, Claimant, Defendant. } No. 559.

BRIEF AND ARGUMENT ON BEHALF OF THE UNITED STATES.

[All Italics are ours unless otherwise stated.]

STATEMENT OF THE CASE.

The information as amended (R. pp. 1–3) alleges that every barrel of vinegar seized was labeled as follows:

"Douglas Packing Company
Excelsior Brand Apple Cider Vinegar made
from Selected Apples
Reduced to 4 Percentum
Rochester, N. Y.
Guaranteed to comply with all Pure Food Laws
Douglas Packing Company
Rochester, N. Y.";

but that its contents "consist wholly or in part of vinegar made from evaporated or dried apples." And it was therefore alleged that the vinegar was adulterated, because it had been mixed and packed

with, and substituted wholly or in part for another article, and that it had been misbranded, because (1) the statements on the label "are false and misleading and deceive and mislead the purchaser, and (2) because "it is an imitation of and offered for sale under the distinctive name of another article."

The Douglas Company, as claimant, had itself made a party defendant (R. p. 4), and filed an answer in which it denied both the adulteration and misbranding (R. pp. 5, 6). Subsequently, by leave of the court, the company withdrew its answer and filed a demurrer to the information (R. p. 7). This demurrer was overruled (R. p. 10); and the cause was then heard by the court (Judge Westenhaver), without a jury, upon a stipulation of facts (R. pp. 10–13). The court in a well considered opinion (R. pp. 14–20) held that the vinegar was misbranded; but held that the charge of adulteration on the ground that it had been mixed and packed with another substance was not sustained, and did not pass on the question of adulteration on the ground that it had been substituted wholly or in part for another article; and judgment was entered in accordance with the opinion (R. pp. 20–22). On appeal the judgment of the lower court was reversed by the majority of the court of appeals, the opinion being prepared by Judge Donahue, and it not appearing which of the other judges concurred (R. pp. 29–36). After a petition for a rehearing was dismissed an application was made to this court for a writ of certiorari, which was granted (R. p. 40).

THE FACTS.

The finding of the District Court was based upon the stipulated facts supplemented by, or construed in the light of, facts of which the court took judicial knowledge. A condensed statement of the material stipulated facts is as follows:

(1) Material from which vinegar made.

The claimant has been ever since 1906 manufacturing from fresh, sound and mature apples Apple Cider and Apple Cider Vinegar, and from evaporated apples of the same character products which it designates "Apple Cider" and "Apple Cider Vinegar." Fresh apples are used during the apple season, between about September 25 and December 15, and evaporated apples during the remainder of the year. (R. p. 11.)

(2) Process of manufacturing the vinegar in question.

The evaporated apples are dehydrated by the most approved process, a small amount of sulphur being used to prevent rot, fermentation and discoloration, and about 80 per cent of the water being removed. Whether and to what extent other constituents are removed is not wholly beyond controversy.

A quantity of evaporated apples are placed in a receptacle and there is introduced an amount of pure water substantially equivalent to that removed in the evaporating process. A weight of more than a ton (to what quantity of apples is not stated) "is

then placed on top of the apples and a stream of water, under a sufficient head, introduced through a pipe at the top of the receptacle, is applied until the liquid, released through a vent at the bottom of the receptacle, which vent opens as the stream of water is applied and closes as it ceases, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar." The quantity of liquid is about the same as would have been obtained from fresh apples, and it carries a small but harmless quantity of sulphur dioxide, which is later removed during the process of manufacture by barium carbonate, or some other chemical agent. The liquid is then converted into vinegar by passing through the two stages of alcoholic and acetic fermentation in the same way as vinegar is made from the juice of fresh apples (R. 11, 12).

(3) Resultant Product.

"After fining and filtration, the resultant liquid obtained by claimant upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples," except it contains a harmless trace of barium; and the vinegar thus obtained "is similar in taste and in composition to the vinegar made from unevaporated apples," except it contains a harmless trace of barium.

It is not claimed that the vinegar thus made from evaporated apples is inferior to that made from fresh apples (R. p. 12).

(4) Commerce in the article.

Since January 1, 1906, claimant has sold its products manufactured from both fresh and evaporated apples as Apple Cider and Apple Cider Vinegar, its vinegar being branded "Excelsior Brand Apple Cider Vinegar made from Selected Apples," or "Sun Bright Brand Apple Cider Vinegar made from Selected Apples." And "for several years prior to the enactment of the Federal Food and Drugs Act and subsequent thereto, vinegar in large quantities, and to a certain extent a beverage, made from evaporated apples was sold in various parts of the United States as 'Apple Cider Vinegar' and 'Apple Cider,' respectively, by many manufacturers, including the American Fruit Products Company, of which company Robert Douglas, president of the claimant company, had been production manager. The American Fruit Company operated eleven plants, located in New England, New York and Michigan." (However it is not stipulated what these products were understood to be by the trade or the consumer).

In selling such products as "Apple Cider" and "Apple Cider Vinegar" claimant acted in good faith.

The report of the Census Bureau shows that in 1910 there were in the United States 430 manufacturers of cider and vinegar, and the total value of the product was $2,254,000, and in 1920 there were 720 manufacturers, and the value of the product was $24,671,000 (R. pp. 12, 13).

(5) Attitude of the Department of Agriculture.

The Department of Agriculture has never sanctioned such labeling, and its attitude with reference to the definition of apple cider vinegar is shown in Circulars Nos. 13, 17, 19, and 136 and Food Inspection Decision No. 140, to which reference will hereafter be made (R. p. 13). And it is not questioned "that the juice of unevaporated apples, when subjected to alcoholic and subsequent acetous fermentation, is entitled to the name 'apple cider vinegar'" (R. p. 12).

Certain inferences which may be drawn from the stipulated facts will be considered hereafter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT.

As agreed in the stipulation, samples of cider and vinegar made from both fresh and evaporated apples were submitted to the district judge; and he found that, "There are slight differences in appearance and taste, but all have the appearance and taste of cider and vinegar" (R. p. 15). He also took Judicial notice that—

> Cider is defined by Webster as "the expressed juice of apples." By the word "expressed" is meant expelled or forced out. From time immemorial apple cider has been understood to mean the expressed juice of fresh apples and not of dried apples. Apple vinegar or apple cider vinegar likewise in the popular mind has from time immemorial been understood as meaning vinegar produced from

> apple cider thus defined. Claimant's label conveys the impression that this vinegar is made from that kind of apple cider and that this apple cider is made in the common and familiar way from fresh or undried apples. The mere fact that the words "apple cider" and "selected apples" are brought together in the same label, conveys unmistakably this impression and repels any other or different impression. Apple cider is a well known product. Apples are a well known fruit. Cider means nothing else to the ordinary mind than the expressed juice of fresh and undried apples. Apples mean nothing else to the ordinary mind than fresh and unevaporated apples. (R. pp. 17 and 18.)

And after stating that the claimant's argument overlooked certain material and controlling considerations, he said:

> One is that apple cider as defined in the dictionaries and as commonly and popularly understood, is the expressed juice of fresh apples, and that apple vinegar is commonly and popularly understood to be produced by the alcoholic and acetic fermentation of that kind of cider. (R. p. 18.)

The conclusion of the court is thus expressed:

> A merchant who advertises and offers apples for sale could not compel a purchaser to accept dried or evaporated apples. The latter are not apples as that word is understood in the trade or by a person of ordinary intelligence, but are a manufactured product, an entirely different article. Nor, in my opinion, could a

merchant who offers apple cider for sale, compel a purchaser to accept a liquid made from evaporated apples in the manner above described, even though it does possess substantially the same chemical constituents and has substantially the same taste as the expressed juice of fresh apples. Claimant's label consequently misleads and deceives. It makes a statement with respect to an article of food which conveys the false notion that this article is vinegar made from the expressed juice of fresh apples. (R. p. 18.)

And further:

> The law was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and that therefore the test of misbranding is the effect of the label or statement upon the ordinary purchaser. A statement that an article is apple cider vinegar made from selected apples, can convey no other idea to such a person in the present state of common knowledge than that the vinegar is made from the expressed juice of fresh apples and not by the manipulation of dried or evaporated apples. If it does, and the ordinary purchaser is or may be thereby misled or deceived, it is no answer to say that he gets a vinegar which is equally good. The object of the law is to let the purchaser know just what he is buying and to let him decide whether he wants it or not. One may not take advantage of his prejudices or want of information to sell him something different from what he thinks he is buying. (R. pp. 18 and 19.)

The facts found by the trial court are conclusive if they can be reasonably inferred from the evidence introduced by stipulation or otherwise. In *Old Colony Ins. Co.* v. *Kolmer* 136 N. E. (Ind.) 51, it was held that "where only evidence submitted on trial was an agreed statement of facts, the appellate court must sustain the conviction on which the judgment is based, if such facts or any inference reasonably deducible therefrom tend fairly to support it." See also *Pneumatic Scale Corp., Ltd.*, v. *Mainwaring*, 286 Fed. 378, 379 (C. C. A. 2d Cir.); and *American Concrete Steel Co.* v. *Hart*, 285 Fed. 322 (C. C. A. 2d Cir.).

OPINION OF THE CIRCUIT COURT OF APPEALS.

The views of the Circuit Court of Appeals are indicated from the following quotations from its opinion:

> The important question in each case is whether the product is the identical thing that its brand indicates. If it is the identical thing indicated by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant. (R. p. 31.)
>
> It must also be assumed that legislation upon any subject has some definite and substantial object in view, and is not in furtherance of technical purposes or barren idealities. (R. p. 32.)

The court after referring to *United States* v. *Lexington Mill & Elevator Company*, 232 U. S. 399 (which involved adulteration alone), where it was

said that the primary purpose of Congress in enacting the Food and Drugs Act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food, said:

> This conclusion was reached evidently upon the theory that the legislative intent was to accomplish a substantial and beneficial result to the public and not merely for the purpose of exercising an arbitrary control over private business. (R. p. 33.)
>
> It is undoubtedly true that vinegar not made from apple cider, even though chemically equal to cider vinegar, may not be branded as such. On the other hand, vinegar made from apple cider is not misbranded by reason of its failure to meet the chemical test. Misbranding is included in the statutory prohibition, because it bears some relation to the conservation of the public health, and not primarily because a purchaser's whims were to be protected, and, though doubtless the test of misbranding a product is whether it is true to name, there is no occasion for overstrictness in applying this test in a case where the public health cannot possibly be jeopardized. In the Standard Encyclopedia, under the caption "Cider," it is said:
>
> "Apples commonly used for making cider are by no means tempting to the palate and are, in fact, unfit for eating raw or ordinary cooking. * * * In the United States it is considered that a certain proportion of decay in fruit improves the flavor."

Keeping in mind the underlying purpose to protect the public health and the admissions in this case that the present article is made wholly from "sound and mature apples, free from rot and ferment," it is clear that condemnation should not be made unless the statute imperatively requires it. Definitions of cider, which include the method or process of its manufacture, written long before public need required the conservation of our food products, are not helpful to the determination of the question presented in the instant case. Even these definitions call only for the juice of apples, and do not literally exclude the pressing of apples dehydrated and later hydrated in equivalent proportions.

The missing and essential element for the government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. (R. p. 33.)

It is not seriously contended on the part of the government that the fluid obtained from pressing the evaporated apples, after the water taken therefrom has been restored, is not apple cider. It is suggested that possibly there is some constituent element of the apple removed by the dehydrating process that is never restored thereto. There is no proof of that fact, but there is an admission that, even if such constituent element is removed, it is so immaterial and inconsequential in quantity that the science of chemistry cannot disclose it. This brings this case clearly within the doc-

trine announced in *U. S.* v. *Lexington Mill & Elevator Co., supra,* to the effect that the burden is upon the government to establish by the evidence, not merely a technical, but a substantial, violation of the federal Food and Drug Act, which may render the article injurious to health, or mislead the public to its prejudice or harm, or induce the purchase of a different article than the article desired. (R. p. 34.)

It may be true that a large part of the purchasing public has no knowledge whatever in reference to the manufacture of cider from evaporated apples, and for that reason might have a distinct prejudice against such a method of manufacture. Undoubtedly the Pure Food and Drug Act contemplates the protection of the public in this regard, but only to the extent that the public shall not be deceived or misled by the brand into buying an imitation of the article or a substitute for the article indicated by the brand. If, however, it is in truth and in fact buying the identical article indicated by the brand, manufactured from the same basic elements, and none other, the purpose of the statute is accomplished, and the process of manufacture is of no importance. (R. p. 34.)

The statement in the opinion that "It is not seriously contended on the part of the government that the fluid obtained from pressing the evaporated apples, after the water taken therefrom has been restored is not apple cider" is entirely erroneous. The government does seriously and earnestly insist

that *such fluid is not cider, and has never been known as cider; and, as will be hereafter shown has never been so defined by any authority.* Furthermore the stipulation shows that such fluid is not obtained *by pressing.*

The difference in the views of the district judge, with whom one of the circuit judges apparently concurred, and the views of the other two circuit judges, is well defined. The view of the District Court was that under the paragraphs of the statute relating to misbranding an article is misbranded if the purchaser is led to believe by the brand that he is purchasing an article made or derived entirely from a certain substance, when in fact he is purchasing an article made wholly or in part from another substance, though the article bought may be about as good as, and but little different in characteristics from the other. On the other hand, the Court of Appeals minimizes the element of deception, and substantially holds that the object of the statute in prohibiting misbranding as well as adulteration is attained if injury to the public health is prevented.

ASSIGNMENT OF ERRORS.

In the petition for writ of certiorari it was insisted that the Circuit Court of Appeals had erred in the following particulars:

1. In failing to hold and decide that misbranding under the Federal Food and Drugs Act must be determined by construing descriptive words upon food and drug labels according to their ordinary and

popular signification to the purchasing public, rather than according to their technical or trade meaning.

2. In holding in substance and effect that the ordinary and popular signification of the terms "Apple Cider" and "Apple Cider Vinegar" were not properly the subjects of judicial notice.

3. In holding that the District Court had erred in taking judicial notice that "Apple Cider" in its ordinary and popular signification meant the native juice of unevaporated apples, and that "Apple Cider Vinegar" meant the vinegar derived by the alcoholic and subsequent acetous fermentations of such juice.

4. In holding in substance and effect that the trade practice or usage prevalent among certain manufacturers and vendors of vinegar, of labeling vinegar derived from evaporated apples as "Apple Cider Vinegar" without disclosure to the purchasing public that such vinegar was so derived, altered the primary signification of these words for the purposes of the Federal Food and Drugs Act.

5. In holding in substance and effect that in order to constitute a misbranding under the Federal Food and Drugs Act, the label must be such as to deceive the purchasers of an article of food or drugs to their substantial injury.

6. In holding that the misbranding provisions of the Federal Food and Drugs Act should be construed as having a relation to the conservation of public health and not as designed to protect purchasers' whims.

7. In holding that the District Court's judgment of misbranding was not sustained by the stipulated facts and the reasonable inferences deducible therefrom. (Pet. pp. 3 and 4.)

BRIEF AND ARGUMENT.

THE DEFINITION OF CIDER ADOPTED BY THE DISTRICT COURT IS UNDOUBTEDLY THE CORRECT ONE; AND THE COURT PROPERLY TOOK JUDICIAL NOTICE THEREOF IN DETERMINING THE MEANING NATURALLY CONVEYED BY THE BRAND USED BY THE CLAIMANT.

By Webster "cider" is defined as "The expressed juice of apples. It is used as a beverage, for making vinegar, and for other purposes," and by way of comment he says "Cider was formerly used to signify the juice of other fruits, and other kinds of strong liquor, but was not applied to wine." In the Standard Dictionary, "cider" is defined as "The expressed juice of apples, used as a beverage, either before or after fermentation; also, sometimes, the juice of other fruits; as, pear cider."

In an article in The Encyclopaedia Britannica relating to cider, it is said:

> Cider and perry (the corresponding beverage made from pears) are liquors containing from as little as 2% of alcohol to 7 or 8%, seldom more, and rarely as much, produced by the vinous fermentation of the expressed juice of apples and pears.

In Nelson's Encyclopaedia it is said:

> Cider is the fermented juice of the apple. The manufacture consists in crushing the apples and squeezing out the juice. The

> juice is poured into casks, where it ferments and clears itself of impurities * * *. As the freshly expressed juice comes from the press, it is placed in covered vats and barrels where it undergoes a rapid fermentation, throwing up a white foaming head of lees.

In Farmers' Bulletin No. 1264, entitled "Farm Manufacture of Unfermented Apple Juice," it is said (p. 4),

> There is some confusion in the use of the terms applied to unfermented apple juice. The term "cider" has been in the past applied to the juice both before and after fermentation, usually with "sweet" or "hard" prefixed to indicate whether fermentation has not or has occurred, but the single word "cider" is also widely used for the unfermented juice.

The courts have frequently recognized the foregoing as the true definition of cider.

Eureka Vinegar Co. v. *Gazette Printing Co.*, 35 Fed. 570, 571 was an action brought against the Printing Company for publishing an article wherein it was declared that the cider manufactured by the plaintiff was subject to the liquor laws of the State of Arkansas; and the material question was whether or not the publication was justified by the facts. In defining "cider," the court (District Judge Caldwell) said:

> The meaning of the word "cider," its method of production, and its general constituents, are matters of common knowledge, and upon which all books of accepted authority agree. *No court would be justified in affecting*

ignorance of these facts, or in closing its eyes to them, in a case requiring their application. In a popular sense, the term "cider" includes the expressed juice of apples, either fermented or unfermented, and hence the terms "sweet cider" and "hard cider" are in popular use to distinguish between the juice of the apple before and after fermentation. In strictness, the juice of the apple before fermentation is simply apple juice, and it is only by fermentation that it becomes cider; and, when the word "cider" alone is used in law or commerce, it is commonly understood to mean the fermented juice of apples.

In *Monroe Cider Vinegar & Fruit Co.* v. *Riordan*, 280 Fed. 624, 626, 627, the question was whether sweet cider was a soft drink within the meaning of the revenue act of 1918, section 628. In defining "cider" the court (C. C. A., Second Circuit) said:

> "Cider," according to the dictionaries, was "formerly any liquor made of the juice of fruits; now the expressed juice of apples, either before or after fermentation." "Hard cider" is "fermented cider." "Sweet cider" is "cider before fermentation or cider in which fermentation has been prevented."
>
> * * * * *
>
> Sweet and hard cider have been designations of the fermented and unfermented expressed juice of apples in common use in the English language long before any man now living was born.

Sterling Cider Co. v. *Casey*, 285 Fed. 885, 886 involved the same question, and in defining "cider" Judge Morton said:

> Cider has been known for centuries. It means, when used without qualification, the pressed-out juice of apples. It was a common beverage long before anybody ever heard of "soft drinks".

The judgment in this case was affirmed by the Court of Appeals on Dec. 21 last; and in its opinion the Court speaks of sweet cider as "a natural fruit juice".

In fact, in no authority is cider defined otherwise than as "the expressed juice of apples". But it appears, especially from some of the encyclopaedias, that the word "cider", when not modified, refers to the juice after alcoholic fermentation.

"Juice" is defined by Webster as "The characteristic fluid of any vegetable or animal substance; the sap or part that can be expressed from fruit, etc." And by the Standard Dictionary "juice" is defined as, "The fluid part of vegetable or animal matter; especially, the expressible watery matter in fruits, containing usually the characteristic flavor, and (chiefly in the plural) the fluids of the body".

The evaporated apples used by claimant retains 20% of the natural quantity of water. By subjecting them to high pressure, a viscid exudation can be squeezed out of them. Can such exudation be properly called the "juice" of the apples? There is

no difference between such a product and that procured by expressing the juice and reducing it 80% by boiling. In each instance, 80% of the water content has been removed.

In *Smith* vs. *Rheinstrom*, 65 Fed. 984, 985, the Circuit Court of Appeals for the Sixth Circuit, speaking through Circuit Judge, (now Mr. Chief Justice) Taft held that cherry juice, from which 80% of the water had been removed by being subjected to heat in a vacuum, was not "cherry juice" within the meaning of the tariff act of 1890, which imposed a tax of 60 cents per gallon upon "Cherry juice and prune juice, or prune wine, and other fruit juices not specially provided for". The court said:

> The juice of vegetables or fruit is nothing but the sap obtained by expression. If the sap is subjected to heat and evaporation, the article thus produced is generally understood to be a different thing from the sap. Thus, the sap of the sugar maple is different from the molasses which is obtained from the sap by boiling, and no one would think of including under the term "sap," if used in the tariff act, the molasses made therefrom. It is true that, for want of a better name, this is called "concentrated cherry juice." It has not been introduced generally enough into commerce to lead to a designation of it by a name which differentiates it from cherry juice other than by adding an adjective descriptive of the change. But concentrated cherry juice is different from cherry juice as molasses is different from sap,

and the difference in the latter case would be quite as great even if molasses were called concentrated sap instead of molasses.

No substance can be genuine apple juice other than that actually expressed from the apple. Such juice is composed of water and solids, one of which is sugar. If after the removal of the water squeezed from the apple and the substitution of other water, it remains apple juice, then the sugar might be removed and other sugar substituted, and it would still be apple juice. And thus, one by one, every ingredient might be removed and an equivalent substituted, and it would still remain apple juice, though not a drop or a particle of it had ever been inside an apple. If this is true, nomenclature means nothing. That which is a chemical equivalent is the thing itself. Oleomargarine is butter, and cotton seed oil is lard.

If, therefore, nothing is apple juice other than that which has been actually expressed from the apple, nothing is apple cider except the apple juice actually expressed from the apple before fermentation and the resultant product of such juice after alcoholic fermentation. Not only is this technically true, but, as above shown, such has been the universal understanding ever since man's knowledge about such matters has been recorded.

VINEGAR HAD BEEN AUTHORITATIVELY DEFINED WHEN THE FOOD AND DRUGS ACT WAS PASSED; AND THEREAFTER THE DEPARTMENT OF AGRICULTURE DECIDED HOW THE PRODUCT HERE IN QUESTION SHOULD BE BRANDED.

By the act of March 3, 1903, making appropriations for the Department of Agriculture for the fiscal year 1904 (32 Stat., Chap. 1008, p. 1158) an appropriation was made for certain purposes among which was "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice."

On December 19, 1904, a report was made to the Secretary of Agriculture by a board representing the Association of Official Agricultural Chemists of the United States and commissioned by the Secretary of Agriculture pursuant to the aforesaid provision submitting for his consideration standards for certain articles, among which was vinegar. This board had defined six classes of vinegar, to wit:

1. Vinegar, cider vinegar, or apple vinegar.
2. Wine vinegar or grape vinegar.
3. Malt vinegar.
4. Sugar vinegar.
5. Glucose vinegar.
6. Spirit vinegar, distilled vinegar, or grain vinegar.

quent acetous fermentations of the expressed juice of apples." *And for the branding of vinegar made from dried-apple products, it was prescribed that:*

> *The product made from dried-apple skins, cores and chops, by the process of soaking, with subsequent alcoholic and acetous fermentations of the solution thus obtained, is not entitled to be called vinegar without further designation, but must be plainly marked to show the material from which it is produced.* (See Food Inspection Decision 140, Department of Agriculture.)

Directions were also given as to the labeling of vinegars containing (1) an addition of water, (2) mixtures of vinegars, (3) containing an addition of boiled cider and coloring matter, (4) mixtures of distilled and sugar vinegars, (5) acetic acid diluted, and (6) a product obtained by distilling wood. In other words, provisions were made for the branding of all kinds of vinegars.

It is true that this decision was not formally adopted as a rule and regulation by the three secretaries; but by section 4 of the Food and Drugs Act the duty of examining specimens of foods and drugs to determine whether or not they are adulterated or misbranded is imposed upon the Bureau of Chemistry of the Department of Agriculture; and that Department is onerated with the duty of initiating proceedings for the enforcement of the law. And as it was established as a rule of action by the Department after such careful investigation when it is pri-

marily the duty of that Department to determine what constitutes adulteration or misbranding, it is entitled to great weight in determining whether or not a brand properly describes the article to which it is attached. In fact if the definition of vinegar by the Board was authoritative as held by Judge Holister, then the branding of claimant's product as "Apple Cider Vinegar" is necessarily a misbranding.

The Department of Agriculture has enforced these regulations by having seized from time to time vinegars misbranded under their terms. As appears from notices of judgments, published as directed by Sec. 4 of the Food and Drugs Act, the following seizures were made and sustained where the misbranding was the same as that alleged in the information filed in this case: No. 5413 filed January 8, 1917, in the District of Rhode Island; No. 5422, filed January 15, 1917, in the District of Massachusetts; No. 8761 filed April 13, 1920, in the Southern District of Ohio; No. 11038 filed July 10, 1922, in the Northern District of Ohio; No. 11326 filed March 10, 1920, in the Eastern District of Wisconsin; No. 1137 filed October 18, 1922, in the Western District of Pennsylvania, and No. 11525, filed January 22, 1923, in the Western District of Pennsylvania. A number of seizures of vinegar have also been made and sustained where the brand violated the Department's regulation, but the misbranding was different from that here charged.

DEFINITION OF CIDER VINEGAR IN STATE STATUTES.

Many State statutes define cider and cider vinegar in terms substantially equivalent to those used in Food Inspection Decision No. 140 of the Department of Agriculture. In some instances, notably Ohio, Pennsylvania, Missouri, Minnesota, Nebraska, and Massachusetts the definitions of these terms are so worded as to unequivocally exclude any product not derived exclusively from pure apple juice. The statutes in those States are as follows:

Ohio Statutes.

The Ohio General Code, Throckmorton, in Section 5786, provides:

> Vinegar shall be made *wholly* from the fruit or grain from which it purports, or is represented, to be made, *and shall not contain a foreign substance* or less than four per cent, by weight, of absolute acetic acid. (99 v. 28, 29, p. 1, 2.)

And Section 5787 provides:

> Vinegar manufactured, offered or exposed for sale, sold or delivered, or in the possession of a person with intent to sell or deliver, under the name of *cider vinegar, apple vinegar, or any compounding of the word "cider" or "apple" as the name or part of the name of vinegar*, shall be the product made by the alcoholic and subsequent acetous fermentations of the juice of apples, *and shall not contain any foreign substance*, drugs or acids, and is laevo-rotatory.

Fully 70 per cent of the vinegar here in question is a foreign substance; that is, was never a part of an apple or apple juice. But the Court of Appeals rightfully regarded the question under this statute the same as that arising under the Federal Food and Drugs Act (R. p. 31).

Pennsylvania Statutes, 1920.

> § 21458. Cider vinegar to be pure apple juice—No person shall manufacture for sale, or offer or expose for sale, *as cider, apple or orchard vinegar, any vinegar not the legitimate product of pure apple juice known as apple cider, or vinegar not made exclusively of said apple cider,* or vinegar into which foreign substances, drugs or acids have (been) introduced as may appear by proper test. (1891, June 11; P. L. 297 § 1.)

In *Commonwealth* v. *Burtnett*, 58 Penn. Supr. R. 604, the Superior Court held that the Act of May 21, 1901, which was in substance identical with the above, prohibited the sale of apple or cider vinegar, where it appears that the product contains approximately eighty per cent of water not derived from the apple but added to the vinegar by the manufacturer in the process of manufacturing. The Court said "we are not concerned with the healthfulness or dangerous qualities of the vinegar sold by this defendant. Our only concern is whether its sale was inhibited by our laws." A writ of certiorari was denied by the Supreme Court.

Revised Statutes, Missouri, 1909.

Sec. 4841. Adulterating vinegar.—Any person who manufactures for sale or offers or exposes for sale *as cider vinegar*, any vinegar not the legitimate product of *pure juice* known *as apple cider*, or *vinegar not made exclusively of said apple cider*, or vinegar into which foreign substances, drugs or acids have been introduced, as may appear on proper tests, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be punished for every offense by fine of not less than fifty dollars nor more than one hundred dollars, and the costs of prosecution, or by imprisonment in the county jail not to exceed ninety days. (R. S. 1899, § 2282.)

General Statutes of Minnesota, 1913.

3691. Vinegar.—The term "vinegar" as used herein, shall be deemed to include any article or preparation designed or offered for sale or used as vinegar, or as a substitute therefor, or imitation thereof. No person shall sell *as cider vinegar* any article or preparation *not wholly from pure apple juice.*

Revised Statutes of Nebraska, 1913.

2575 "Cider" defined.—For the purposes of this article, "cider" shall be construed to mean *pure apple juice, absolutely free from any foreign substance.* (1897 p. 42; Ann. 9854; Comp. 501.)

2579 Vinegar.—No person, firm or company shall manufacture for sale, offer or expose for sale, sell or deliver, or have in his

possession with intent to sell or deliver, any vinegar, not in compliance with the provisions of this article. *No vinegar shall be sold as apple, orchard, or cider vinegar, which is not the legitimate product of pure apple juice, known as apple cider, or vinegar not made exclusively of said apple cider,* or vinegar into which foreign substance, drugs, or acids have been introduced, or which upon proper test shall contain less than one and six-tenths per cent by weight of cider-vinegar solids, upon full evaporation at the temperature of boiling water. (1897 p. 43; 1909 p. 53; Ann. 9859; Comp. 506.)

Massachusetts, General Laws, Chapter 94, Sec. 171.

* * * whoever labels, brands or sells as *cider vinegar* or as *apple vinegar*, any vinegar not the *ex-clusive* product of the alcoholic and subsequent acetous fermentation of the *pure juice of fresh apples*, shall be punished by a fine of not more than one hundred dollars."

The recital in claimant's label "Guaranteed to comply with all pure food laws" can only mean that if there be a statute, Federal or State, requiring apple cider vinegar to be made exclusively from the pure natural juice of apples, this vinegar meets that requirement. Therefore as to a number of States this statement is absolutely false, and is necessarily a misbranding. In *Wood Mfg. Co.* v. *United States*, 286 Fed. 84, 88 (C. C. A. 7th Cir.) it was held that a coloring material used for coloring cakes, etc., the label on which contained the statement, "War-

ranted. Complies with all requirements," but which contained a salt content of more than 5 per cent, when the Department of Agriculture had a requirement that such a product should contain a salt content of less than 5 per cent, was misbranded because of the false impression thus made. And in *United States* v. *Ten Barrels of Vinegar*, 186 Fed. 400, 401, in which the vinegar was condemned because improperly labeled," a blend of pure boiled apple cider and distilled vinegar," the label also containing a guarantee similar to the one in the label here in question, the court (Judge Quarles) said:

> In other words the ordinary purchaser reading this label would not be led to suppose he was buying distilled vinegar compounded with a foreign element. He is comforted with the assurance: "We guarantee the vinegar sold under our brand to comply with the requirements of the National and State pure food laws."

THE PRIMARY OBJECT OF THE PROVISIONS OF THE STATUTE WHICH RELATE TO MISBRANDING WAS TO PREVENT DECEPTION, AND ENABLE THE PURCHASER TO KNOW THE PRECISE ARTICLE HE IS BUYING.

The act is divided into two parts, one of which prohibits adulteration and the other misbranding. The primary object of the prohibition of adulteration was to protect the public against unwholesome foods, and to prevent an inferior food from being sold as one having a superior quality. On the other hand, the primary object of the provisions against misbranding was to prevent the purchaser from being

deceived in the quality or character of the food purchased. In other words, it was to enable him to know exactly what he is purchasing, regardless of the relative merits of the article which he actually purchases and the one he intends to purchase. There may be no difference in the food value of a lamb chop and a veal chop, but the purchaser has his preference, and should receive the one he calls for.

Nothing can more clearly show this purpose than the language of the act itself. Section 8 of the act (34 Stat. 770) declares:

> That the term "misbranding," as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any *statement*, design, or device *regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular*;

and with reference to foods, it is declared that an article shall be deemed to be misbranded:

> First. If it be an imitation of or offered for sale under the distinctive name of another article.
>
> Second. *If it be labeled or branded so as to deceive or mislead the purchaser.*
>
> * * * * *
>
> Fourth. If the package containing it or its label shall bear any *statement*, design, or device regarding the ingredients or the *substances contained therein, which statement, design or device shall be false or misleading in any particular.*

That these provisions were intended to prevent deceptions of all kinds has been repeatedly recognized, and in fact emphasized, by this court.

In *United States* vs. *Antikamnia Co.*, 231 U. S. 654, 665, the court said:

> The purpose of the act is to secure the purity of food and drugs and *to inform purchasers of what they are buying.* Its provisions are directed to that purpose and must be construed to effect it.

In *United States* vs. *Lexington Mill Company*, 232 U. S. 399, 409, the court said:

> The legislation, as against misbranding, *intended to make possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality.*

In *United States* vs. *Coca-Cola Company*, 241 U. S. 265, 287, it was said:

> *The aim of the statute is to prevent deception*, and that which appropriately describes a different compound can not secure protection as a "distinctive name."

The language of the court in the foregoing cases was quoted with approval in the case of *United States* vs. *Schider*, 246 U. S. 519, 522, in which it was held that a bottled article labeled "Compound Ess Grape," which contained nothing from grapes, was adulterated, as some other substance had been substituted for that obviously indicated on the label,

and also misbranded, as the label carried a false and misleading name. In condemning the label, the court said:

> The stuff put into commerce by defendant was an "imitation" and if so labeled purchasers would have had some notice. To call it "compound essence of grape" certainly did not suggest a mere imitation but on the contrary falsely indicated that it contained something derived from grapes. See *Frank* v. *United States,* 192 Fed. Rep. 864. *The statute enjoins truth; this label exhales deceit.*

In *Weeks* vs. *United States,* 245 U. S. 618, 621, it was held that an article branded "Special Lemon. Lemon Terpene and Citral", which contained alcohol and citral made from lemon grass, was misbranded because it was offered for sale as lemon oil when in truth it was an imitation thereof. The court said:

> It is apparent that the statute specifies and defines at least two kinds of misbranding—one where the article bears a false or misleading label, and the other where it is offered for sale under the distinctive name of another article. The two are quite distinct, a deceptive label being an essential element of one, but not of the other. No doubt both involve a measure of deception, but they differ in respect of the mode in which it is practiced.

The following cases decided by lower courts involved facts which presented the same question as that here presented.

In *United States* vs. *Ten Barrels of Vinegar,* 186 Fed. 399, 401, 402, the question was whether vinegar

branded "Saratoga Brand vinegar, a blend of pure boiled apple cider and distilled vinegar", which did not in fact contain apple cider vinegar, was misbranded. Judge Quarles, who heard the case, said:

> It is matter of common knowledge that cider vinegar is far superior to distilled vinegar. The popularity of cider vinegar is so general that this brand, not subjected to critical examination, would naturally arouse the expectation that cider vinegar has been blended with distilled vinegar.

Again:

> We have seen how naturally the buyer might be misled by a casual examination of the label. The use of the term "blend" coupled with a specific reference to the pure food act, is well calculated to confirm such mistake, in view of the guaranty that the vinegar sold under this brand meets all the requirements of the national pure food law. Special significance is thus given to the statutory definition of the term "blend". It is true that boiled apple cider might be used as a harmless agent to give color or flavor to the distilled vinegar; but in such a case the boiled cider would be an infusion as distinguished from a "blend", and the public would be entitled to notice of its use for that qualified purpose. Here it is presented to the public as a blend, which is falsely misleading, because it is conceded that no cider vinegar whatever is contained in these packages.

In *Libby, McNeill & Libby* vs. *United States* (C. C. A. 4th Cir.), 210 Fed. 148, 150, the question

was whether a product labeled "Target Brand of Condensed Skimmed Milk," which contained more than two parts of cane sugar to something less than three parts of the more nearly solid constituents of skimmed milk, was misbranded. The court said:

> The words on the label were all in ordinary use. Each and every one of them could and would be understood by the general public to have been intended to convey their accustomed meaning; that is to say, the average man who read the label would suppose that the can contained skimmed milk which had been reduced in bulk by evaporating or otherwise driving off a part of its fluids.

In *United States* vs. *One Hundred and Fifty Cases of Fruit Puddine*, 211 Fed. 360, Judge Morton held that a product known as "Fruit Puddine" and labeled "Fruit Flavored Puddine," when in fact no fruit was used in the product, was misbranded because the expression led the purchaser to believe that it was flavored with actual fruit.

In *United States* vs. *Two Cases of Chloro-Naptholeum Disinfectant*, 217 Fed. 477, Judge Rose held that a disinfectant which was labeled "Chloro-Naptholeum," but which did not contain as an essential ingredient either chlorine or chlor-napthol was misbranded. The claimant also contended that the general public was not familiar with chemical terms, and that the article had been long sold under that designation, and in fact it had become a distinctive name. But in passing upon the motion for a

new trial, the court said the jury was instructed that a word does not become purely arbitrary until it has lost the descriptive significance both to specialists in the subject and to the general public. It was held therefore that the jury was warranted in finding that the label contained a false suggestion.

THE RULING OF PRESIDENT, NOW MR. CHIEF JUSTICE, TAFT WITH REFERENCE TO THE BRANDING OF WHISKY IS DIRECTLY IN POINT.

The proper label for branding whiskys to comply with both the Internal Revenue Laws and the Food and Drug Acts was given special attention during the latter part of the administration of President Roosevelt and the first part of President Taft's administration. The matter was referred to Solicitor General Bowers; and after extended hearings a ruling was made by him from which an appeal was taken to the President. The question determined was the kinds of liquors that could legally be branded as "whisky." The record was carefully reviewed by the President; and in his opinion he defined the objects of the Pure Food Act to be:

> One to preserve the health of the people, and *the other to prevent their being deceived by label or brand as to the real character of drugs or articles of food offered for sale* (Op. p. 1).

After reviewing the facts he stated that:

> The question, therefore, is not here one of health. It is only one of correct branding *to prevent deceit of the public as to what it is buying* (Op. p. 5).

With reference to the understanding of the public as to what articles were whisky, the President said:

> All these products—straight whisky, rectified spirits whisky, redistilled spirits whisky, and neutral spirits whisky—when reduced by water to a hundred proof or less and sold upon the market as beverages *were known to the trade and to the customers as whiskies;* (Op. p. 5).

and again:

> After an examination of all the evidence it seems to me overwhelmingly established that for a hundred years the term "whisky" in the trade and among the customers has included all potable liquor distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the Pure Food Act to attempt now to limit the meaning of the term "whisky" to that which modern manufacture and taste have made the most desirable variety (Op. p. 6).

But with reference to spirits made from molasses he said:

> *Neutral spirits made from molasses and reduced to potable strength has sometimes been called whisky, but not for a sufficient length of time or under circumstances justifying the conclusion that it is a proper trade name. The distillate from molasses used for drinking has commonly been known as rum. The use of whisky for it is a misbranding* (Op. p. 8).

It was held, therefore, that all of the different kinds of whiskies first mentioned could be legally labeled "whisky" *because each of the liquors mentioned was and had been for a great many years known by the public as "whisky," but spirits made from molasses, although containing chemically precisely the same elements, could not be legally branded "whisky;" because the public had never known it by that name.*

THE STATUTE WAS DESIGNED TO PUT INTO EFFECT IN THE SALE AND PURCHASE OF FOODS AND DRUGS THE GENERAL PRINCIPLES OF LAW RELATING TO TRADE IN GENERAL.

It is a principle of universal application that the courts will regard with the utmost disfavor any representation by brand, trade-mark, or otherwise, which deceives or tends to deceive purchasers, or any material part of them.

The Prince Manufacturing-Company vs. *Prince's Metallic Paint Company*, 135 N. Y. 24, 37, 39, was an action to enjoin the use of a trade-mark. The facts were that the trade-mark "Prince's Metallic Paint" at first was applied exclusively to a paint manufactured from an ore which was mined from a small tract of land belonging to Prince, containing about forty acres. The paint had been widely advertised as possessing peculiarly good qualities because of the character of ore contained in this small tract. Some time before this action was brought, the complainant had been manufacturing paint from ore, about one-fourth of which was taken from that particular tract and three-fourths from other lands,

some of the paint containing no ore mined from the small tract. The court dismissed the suit saying:

> The label was an assurance to purchasers that the paint to which it was attached was made from the ore of the Prince mine, and was a guarantee that they were receiving paint so manufactured. By affixing the label to paint manufactured from other ores the plaintiff availed itself of the credit which pertained to paint manufactured from the Prince ore bed, to put upon the market paints manufactured from other ores, without so far as appears, disclosing the difference of origin. Purchasers were deceived and the plaintiff reaped the advantage of the deception.

And with reference to the contention that the paint made from ores mined elsewhere than from the Prince tract was just as good, the court said:

> *Nor is it any answer to this point that the article sold under the name of "Prince's Metallic Paint" was as good as that made from the ore of the original mine.* A party can not secure the confidence of the public in an article on the ground that it is made from one material, of which the trade-mark is a guaranty, and then without advising the public, substitute another material and sell that upon the credit of the true article, *and justify the false use of the trade-mark or label on the ground of similar quality.* If this was permitted, it would offer a temptation to fraud, and an inferior article might be palmed off on unsuspecting purchasers. *And although the false*

article is as good as the true one, "the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce."

This case was cited with approval by this court in *Worden* vs. *California Fig Syrup Company,* 187 U. S. 516, 529. That action was brought to restrain the defendant from using a label "Fig Syrup" or "Syrup of Figs" upon a bottle containing a liquid laxative medical compound. The complainant contended that it had an exclusive right to use such description. It appeared, however, that there was practically no syrup or extract of figs in the compound, but that its medicinal quality was due to the senna which it contained. The court held that the brand "Syrup of Figs" upon such a compound was false and misleading, and dismissed the action. The court quoted from an opinion of Circuit Judge Colt (66 Fed. 750) in a case brought by the same company and for the same purpose, in which it was said:

> The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will not permit of any such deception. *It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this prepa-*

> *ration on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trade-mark in these words.* The cases are numerous where the courts have refused to grant relief under these circumstances. (p. 534).

The court also quoted from an opinion of the Circuit Court of Appeals (6th Circuit, 73 Fed. 812,817) delivered by Circuit Judge (now Mr. Chief Justice) Taft, as follows:

> The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. *But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined.* (p. 536).

IN DETERMINING WHETHER A LABEL OR A BRAND IS DECEPTIVE, THE COURT WILL GIVE TO ITS WORDS, OR THE PHRASE, THE MEANING GENERALLY GIVEN BY THE PUBLIC.

The important question is whether a material number of those who purchase the article are deceived by the language of the label. If so, though it be technically correct, the article is misbranded.

The language of a statute will be so construed as to effect the object for which the statute was enacted. Therefore different rules of construction apply to different statutes. But, even in tariff acts, the *usual* meaning will be given to words unless it clearly appears that the meaning has been modified by commercial use, and that such commercial meaning was well known when the statute was enacted.

Thus in *United States* vs. *Isham*, 17 Wall. 496, 504, the court said:

> The words of the statute are to be taken in the sense in which they will be understood *by that public in which they are to take effect.* Science and skill are not required in their interpretation, except where scientific or technical terms are used.

In *Saltonstall* vs. *Wiebusch*, 156 U. S. 601, 602, the court said:

> There was no evidence in this case that the word "forgings" was used in any commercial or technical sense among manufacturers, and, in the absence of such evidence, we are bound to presume that it was used in its ordinary and commercially accepted sense of metal shaped by heating and hammering.

In *Swan* vs. *Arthur*, 103 U. S. 597, 598, it was said:

> While tariff acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown.

In *Maddock* v. *Magone*, 152 U. S. 368, 371, the court said:

> Necessarily the commercial designation is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal.

In *Libby, McNeill & Libby* vs. *United States*, 210 Fed. 148, 150 (C. C. A., 4th Circuit), after recognizing that under the tariff laws the commercial meaning will be given to a word where such meaning is well understood, with reference to the meaning of words in determining whether a brand upon an article of food is violative of the Food and Drugs Act, the court said:

> Pure food laws are intended to protect the public, whose members may be, and in the more numerous part usually are, ignorant of the technical significance which ordinary words may have acquired in particular trades or industries. The Supreme Court of Michigan has said that decisions construing revenue acts—
>
> "do not apply to cases arising under the pure food laws of state governments. Courts will take cognizance of the well-known fact that farmers, laboring men, and consumers are not generally familiar with the customs of trade and commerce in importing goods, or of the understandings of the trade between manufacturers and merchants who buy these products for retail trade. Such construction would emasculate the pure food laws, and deprive the people of the protection which the

> Legislature wisely intended to give them." *Armour & Co.* v. *Dairy and Food Commissioner*, 159 Mich. 10, 123 N. W. 580, 25 L. R. A. (N. S.) 616.

Royal Baking Powder Co. vs. *Emerson*, 270 Fed. 429, 435, 437, 440 (C. C. A. Eighth Cir.), was an action brought to enjoin prosecutions against the plaintiff under the Food and Drugs Act of the State of Arkansas. The Royal Baking Powder Company had for many years used a certain brand upon its cans. Thereafter it changed the leavening agent of the baking powder, and made certain changes in its brand; and the question was whether or not the label thus changed was a misbranding. The court held that the article was misbranded; and in the course of its opinion said:

> The broad purpose of the Arkansas statute is to prevent deception through a label or brand. The deception must be of the average buyer of the product. *Ansehl* v. *Williams*, 267 Fed. 9, this court, filed July 15, 1920. *To ascertain whether a given label would act deceptively, the attitude of the average buyer toward that product at the period the label is put out may be examined.* In no other way can there be proper determination of the probable effect upon him of the label. In most instances there is no definite nor particular information as to this attitude, and therefore the average buyer, in such instances, is treated as a person of average intelligence, exercising ordinary care in ascertaining what he is purchasing. In such cases he is charged with knowledge of what the label fairly tells him.

> The question there gets down to the statements upon the label itself. If they are, in words, form, and arrangement, such as to fairly apprise the average buyer of the truth as to the product, they are sufficient.

Again:

> Misbranding, however, does not rest upon unwholesomeness nor adulteration. *It rests upon deception of the buyer.* That deception consists in inducing him to purchase, under a given mark, brand, or label, an article which is different from that which he intends to buy, and which he has a right reasonably to suppose he is getting under that mark, brand, or label.

And again:

> If the manufacturer makes a change in the article and that change be of a character which would, considering all of the attendant circumstances, naturally affect the attitude of the purchasers of that article, fair dealing and the law require that such purchasers be effectively informed of that change.

WHEN THE BRAND IS DECEPTIVE, ITS ILLEGALITY IS NOT CURED BY LONG USAGE.

In *United States* v. *Coca Cola* Co., 241 U. S. 265, 279, the court said with reference to adulteration:

> Again, articles of food including "proprietary foods" which fall within this condemnation are not saved because they were already on the market when the statute was passed. The act makes no such distinction; and it is to be observed that the proviso of

> section 8 explicitly refers to "mixtures or compounds which may be now or from time to time hereafter known as articles of food." Nor does the length of the period covered by the traffic, or its extent, affect the question if the article is in fact adulterated within the meaning of the Act.

And in *Federal Trade Commission* against *Winsted Company*, 258 U. S. 483, which was a case arising under the unfair practice provision of the Clayton Act, the court said:

> The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value, does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived.

But it is not necessary to invoke this principle of law in view of the facts of this case.

While in the stipulation, it is agreed that the claimant has been branding its product in the manner specified ever since January 1, 1906, and, further, that for several years prior to the enactment of the Food and Drugs Act and subsequent thereto, vinegar in large quantities, and to a certain extent a beverage made from evaporated apples, were sold in various

parts of the United States as "apple cider vinegar" and "apple cider" by many manufacturers, yet there is nothing in the stipulation from which it can be inferred that the meaning of those terms have become altered even in commerce; or that the product has been accepted as such by either the trade or consumer; but on the contrary the stipulation shows a constant challenge of this label by the pure food officials of the Federal Government. Nor is it stipulated that a large *per cent* of the total quantity of vinegar made from apples and shipped in commerce is manufactured from evaporated apples. The stipulation says that a large *quantity* has been manufactured; but it is further agreed that in 1920 there were seven hundred and twenty manufacturers of cider and vinegar, and the value of the product manufactured was $24,671,000.

THE BRANDING OF VINEGAR MADE FROM EVAPORATED APPLES AS "APPLE CIDER VINEGAR" IS GROSSLY DECEPTIVE.

The facts set forth in the stipulation, though manifestly worded most favorably to claimant, together with such knowledge as every one having the least experience possesses, show beyond question that the brand "apple cider vinegar" upon vinegar made from evaporated apples "exhales deceit."

The stipulation recites that:

> It is not disputed or questioned in this case that the juice of unevaporated apples, when subject to alcoholic and susbequent acetous fermentation, is entitled to the name "apple cider vinegar" (Par. 8, p. 12.)

This stipulation is equivalent to saying that vinegar produced by fermentation of the expressed juice of fresh apples has generally been known as, and in fact is, "apple cider vinegar." But such a stipulation was wholly unnecessary, because as above shown the knowledge of such fact is universal, and the courts must take cognizance of it. *On the other hand, no facts are stipulated from which it can reasonably be inferred that the consumers of vinegar or any substantial part of them have ever understood that the term "apple cider vinegar" applies to vinegar fermented from a fluid containing 80 per cent of water substituted for the water expressed from apples; or have any knowledge that there is upon the market a vinegar branded and sold as "apple cider vinegar," which in fact is manufactured from evaporated apples.*

"Cider" is the expressed juice of apples, the juice with all of its constituents, and without any substitution, as it comes from the apple. No one ever heard of any substance, about 75 per cent of which is a substitute, being called cider until some manufacturers of pectin desired to realize additional profits by selling this by-product as genuine cider. Necessarily, apple cider vinegar must from its very terms be taken to mean vinegar resulting from the fermentation of apple cider; and, if apple cider is nothing but the actual fluid expressed from apples, apple cider vinegar is nothing but vinegar made by the fermentation of such fluid. And the public universally so understand.

In fact claimant's opposition to being required to show in its label that the product is made from evaporated apples is a concession that it is deceiving the public. In its brief filed in the Circuit Court of Appeals (p. 3), it said:

> "These labels, or brands, through their use for the last sixteen years, have acquired an immense value and *claimant will suffer an irreparable loss, and no benefit will accrue to consumers or purchasers, if the Government succeeds in arbitrarily forcing claimant to distinguish that part of its product made from apples which have been evaporated from that made from apples which have not been evaporated*, when the product in each instance is in fact identical, differing only in the process of manufacture."

And in its motion to advance the cause in the Court of Appeals it said:

> Plaintiff in error is one of the largest manufactures of vinegar in the United States, and until the present controversy in regard to the labeling of vinegar is settled *it is very seriously handicapped in the manufacture and distribution of its product.* (R. p. 27.)

If claimant will suffer an irreparable loss if required to tell the truth in its label, it is now making an enormous profit because the truth does not appear in the label. Its loss will result from the unwillingness of the public to buy for "Apple Cider Vinegar" a vinegar made from evaporated apples; which means that the public is now buying its product labelled

"Apple Cider Vinegar" because it does not know that it is made from evaporated apples. The difference between the quantity of sales now made and the price now received for the product, and the sales it would make and the price it would receive if required to show in its brand that this vinegar is made from evaporated apples is the measure of the deception that claimant is now practicing upon the public.

REASONING AND ILLUSTRATIONS OF THE CIRCUIT COURT OF APPEALS.

The Court of Appeals' reasoning and illustrations are wholly beside the mark. It concedes that the public may have a prejudice against vinegar made from evaporated apples, but supposes it is the result of ignorance. But one has a right to his choice regardless of how that choice arises. Suppose a customer should go into a store where there was kept unlabelled vinegar made from fresh apples and also vinegar made from evaporated apples, and should specifically request and pay for vinegar of the former kind, would it be honest to give him vinegar of the latter kind? If a merchant should give to a customer vinegar made from evaporated apples stating falsely that it was made from fresh apples, and charge the price at which fresh apple vinegar is sold, would it not be such a flagrant deception that the customer could recover the difference in the prices of the two kinds of vinegar? Yet that is precisely what claimant is doing, except instead of making the false statement by word of mouth it is boldly and prominently inserted in the label which the Statute requires

to state the truth; *and thus under the decision of the Court of Appeals the Statute itself is made to assist in imposing the deception upon the public.*

Congress recognized that the public has its prejudices with reference to articles of food, some of which are probably unreasonable and not well founded; and it therefore declared it a misbranding if the "label shall bear any statement regarding the ingredients, which statement shall be false or misleading *in any particular.*" Congress therefore prohibited the Courts from hunting around in each particular case to ascertain whether the public's prejudice was reasonable or unreasonable. The public is entitled to its prejudices; and it is not for the Courts to say whether they are well or ill founded. In fact the prejudices and inclinations of the public control in a very large measure the prices of articles moving in commerce.

One illustration used by the Court of Appeals is maple sirup. It says that it is the same sirup whether made by reducing the sap of the maple by boiling to the proper consistency, or by reducing it to sugar and then adding enough water at the proper temperature to reconvert it into sirup. But without considering the difference between the words "Juice" and "Sirup," or whether the illustration is precisely parallel, a complete answer is, that, if *the public knows that genuine maple sirup is made both ways, and recognizes that one is as good as the other, either can be branded "maple sirup."* In fact, the board

established under the Act of March 3, 1903, so found, and defined maple sirup as, "Sirup made by the evaporation of maple sap or by the solution of maple concrete." (See circular No. 13). The Court also illustrates with cream separated from the remainder of the milk by the natural process of rising to the top and cream separated by the operation of a separator. But that illustration does not present a condition at all parallel. In each instance it is the very cream that came from the cow without any substitution whatever. And what the public wants is cream.

A more apt illustration is condensed or evaporated milk. Suppose sufficient water be added to restore such an article to its fluid condition, could it legitimately be sold as fresh milk?

THERE IS IN FACT A VERY MATERIAL DIFFERENCE BETWEEN GENUINE APPLE CIDER VINEGAR AND THE PRODUCT SEIZED IN THIS CASE.

But the so called prejudice of the public against vinegar made from evaporated apples is not unfounded and unreasonable, because the facts clearly show that there is a material difference between the two kinds of vinegars.

It is stipulated that:

> There is no claim by libellant that the vinegar manufactured by claimant, and seized in the respective actions in this jurisdiction, is inferior to that made from evaporated apples (Par. 5, p. 12).

The wording of this paragraph is very peculiar. It is not said that the product seized is in fact not in-

ferior to that made from evaporated apples, but that such inferiority is not claimed. In other words, it is not relied on by the Government. This attitude was taken because the question of the relative merits as a food between the two products was not, so far as misbranding is concerned, regarded as a matter of any importance. In fact, the stipulation means practically nothing, because it does not define the meaning of the word "inferior" as there used. Presumably, it means that the product seized is not less wholesome than genuine apple cider vinegar, or probably that it contains as much acetic acid. But those are not the only tests of merit. It is also stipulated that this product is similar in taste and in composition to the vinegar made from unevaporated apples (Par. 4, p. 12). But as provided in paragraph 7, samples of both kinds of cider were submitted to the trial court, and he found that "There are slight differences in appearance and taste, but all have the appearance and taste of cider and vinegar." (R., p. 15.)

It is further stipulated in paragraph 3 (p. 11):

> Whether and to what extent any other constituents of the apple are removed by the process of dehydration is not wholly beyond controversy; in the present state of chemical science no acceptable test or method of analysis is provided so far as parties to this controversy are advised, for determining to what extent any constituents of the apple other than water are removed by the process of dehydration.

Manifestly the difference in appearance and taste observed by the court is due to the escape of congeneric substances in dehydration. Anyway, the difference exists; and the popularity of many an article has been established on differences no more substantial. Many brands of liquors became popular because of but very slight differences in odor and taste, and the same is true with reference to tobacco and cigarettes. And who can describe the shades of differences in odors of delicate perfumes, and yet their popularity depends upon these shades. So with vinegar which is used in salad dressings and upon different articles of food consumed without further preparation, their odor and taste materially depend upon the kind of vinegar used, and slight differences may mean much in determining the desirability of the food.

The differences noticed by the Court are what have made genuine cider vinegar so popular. Dilute alcohol is the base of all vinegar, and whether produced from grain, molasses, or glucose has the requisite acidity and the color, flavor, and aroma peculiar to the substance from which the alcohol was derived. The popularity of genuine cider vinegar is not because of its acidity, but because of its characteristic and pleasing color, flavor, and odor, and it is really this flavor and boquet which the consumer expects and is paying for when he buys genuine cider vinegar. The consumer is being deceived, therefore, when he has sold him as genuine cider vinegar a vinegar which

simulates it in color and analytical composition, but having been made from dried apples is necessarily deficient in certain irreplaceable flavors and boquet which have been dissipated in the process of evaporation and sulphuring of the raw material. It is hardly accurate to say that genuine cider vinegar is a manufactured product. It is a natural product which nature produces without the aid of man. That is to say, alcohol develops in the native juice of a mature apple, and the alcohol acetifies into acetic acid through nature's operations without artificial aid.

Another fact appears in paragraph 4, (p. 11) which is suggestive. It is there said that, as a result of the process first described, the liquid obtained "is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used," and "carries a *small and entirely harmless* quantity of sulphur dioxide, which is removed during the process of fining and filtration, by the addition of barium carbonate, or some other proper chemical agent, which by precipitation eliminates such sulphur compounds."

If the quantity of sulphur dioxide is entirely harmless, why remove it? In the United States Dispensatory in describing the properties of barium carbonate it is said: "Barium carbonate acts as a poison on the animal economy. Its only pharmaceutical use is to prepare barium chloride." Why treat this fluid which is to be converted into vinegar

with this poisonous substance to eliminate a *harmless* trace of sulphur dioxide? *Manifestly, it is done for no other purpose than to destroy positive and certain evidence of the character of the product;* and while it may be, as further stipulated, that the trace of barium which is left after the chemical process by which the sulphur dioxide is removed is harmless, yet suppose that inadvertently or by mistake an excessive quantity of this poisonous substance were introduced, more than would be neutralized by the sulphur dioxide, the serious effects of such a mistake are apparent.

NO VALID OBJECTION TO THE LABEL SHOWING THE FACTS.

What valid objection can claimant have to branding its product so as to show the exact facts? It claims that vinegar made from evaporated apples is just as good as vinegar made from the juice of fresh apples. If this is true, the public has no way of learning that fact except by using the two products *knowingly;* and in time claimant's product can be sold at the same price without the use of the deceptive brand. Under the directions for labeling adopted by the Department of Agriculture, this product should be labeled "Vinegar produced from evaporated apples." If sold under such label, the purchaser would know exactly what he is buying. As it is, the purchaser believes he is buying vinegar manufactured from the juice of fresh apples, and certainly has no knowledge that it is made from evaporated

apples; and if he is satisfied with its quality vinegar made from evaporated apples receives no credit from such satisfaction.

As said by Judge Rose in *United States* v. *Two Cases of Chloro-Naptholeum Disinfectant*, 217 Fed. 477, 484: "Claimant points out that for many years it has sold large quantities of its products under this particular name. It has done no harm to anybody. It asks why it should be compelled to incur all the trouble and expense of familiarizing the purchasing public with a new name for the old thing. There is no doubt that to do so will be both costly and inconvenient. Nevertheless, it must be borne in mind that in the long run the honest manufacturer, as claimant doubtless is, is the one principally interested in the strict, and in even the rigid, enforcement of laws of this character. The more candid all his competitors are required to be, the better for him. Standards impossible of unvarying application will work to his injury. *He can not afford to say anything about his goods which is not in every reasonable sense, and from the standpoint of every well-informed person, true.*"

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

JAMES M. BECK,
Solicitor General.

J. A. FOWLER,
Special Assistant to the Attorney General.

○

No. 330.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA,
Petitioner,

vs.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY,
Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

BRIEF OF DOUGLAS PACKING COMPANY, CLAIMANT.

JOHN G. WHITE,
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Union Trust Bldg., Cleveland, O.,
Attorneys for Claimant.

No. 559.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA,
Petitioner,

vs.

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No. 559.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA,

Petitioner,

vs.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY,

Claimant.

BRIEF OF DOUGLAS PACKING COMPANY, CLAIMANT.

STATEMENT OF THE CASE.

This case originated in the United States District Court for the Northern District of Ohio, Eastern Division, and involves the libeling of ninety-five barrels, more or less, apple cider vinegar, manufactured by claimant, Douglas Packing Company. The barrels were marked on one end—

"Douglas Packing Company
Excelsior Brand apple cider vinegar
made from selected apples
Reduced to 4 per centum
Rochester, New York."

and on the other—

"Guaranteed to comply with all
Pure food laws.
Douglas Packing Company,
Rochester, New York."

(Rec. P. 5), and had been shipped by claimant from its plant at Fairport, New York, to Fisher Brothers at Cleveland, Ohio. The libel charges that the vinegar was *adulterated* * under Paragraphs First and Second of Section 7 of the Pure Food & Drugs Act, in that vinegar made from apples or apple products that had been evaporated or dried, had been mixed, packed with and substituted wholly or in part for the article.

It also charges that the vinegar, being made from apples that had been evaporated, was *misbranded* under general paragraph, Section 8, and Paragraphs First, Second and Fourth of Section 8 of said Act, in that (a) the statement on the label "Vinegar made from selected apples and manufactured to comply with all pure food laws" was false and misleading, and deceived and misled the purchaser, and, (b) the vinegar in question was an imitation of and offered for sale under the distinctive name of another article, to-wit, "Apple Cider Vinegar." (Rec. pp. 1-2.)

Douglas Packing Company, claimant and defendant in error herein, intervened, claimed the vinegar, and, answering the libel (Rec. pp. 5-6), admitted the shipment, and that in the manufacture thereof, apples that had been first evaporated had been used, but denied that the vinegar was either adulterated or misbranded by reason of being thus manufactured.

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* NOTE: Italics throughout the brief are ours unless otherwise stated.

A jury trial was waived, in writing (Rec. p. 13), and the case tried to the Court on an agreed statement of facts (Rec. pp. 10-13), in connection with which statement, claimant submitted the following exhibits:

(1) Sample of unfermented liquid from apples which had not been evaporated.

(1a) Sample of unfermented liquid from apples which had been evaporated.

(2) Sample of fermented liquid from apples which had not been evaporated.

(2a) Sample of fermented liquid from apples which had been evaporated.

(3) Sample of vinegar seized in the within action.

(3a) Sample of vinegar made from apples which had not been evaporated. (Rec. p. 14.)

There is no claim or charge by the Government that the vinegar libeled is below the prescribed standard, impure, unwholesome, or inferior to that made from apples which have not been evaporated. The sole objection is to the use of apples which, for economy, have been evaporated.

The District Court held that there was no *adulteration* within the meaning of Paragraph First, Section 7 of the Act, made no ruling as to Paragraph Second, Section 7, but sustained the charge as to *misbranding* for the reason that the vinegar was not made from the juice of "fresh apples," on the theory that the manufacture of vinegar from apples that had been preserved through being subjected to evaporation was contrary to the various definitions of apple cider vinegar of which the Court took judicial notice, and to the popular notion of the method of the manufacture of that kind of vinegar. A judgment of forfeiture and condemnation was entered. (Rec. pp. 20-22)

There was no evidence to support such a theory, nor does it follow from the agreed statement of facts, inasmuch as it there affirmatively appears, that *since prior to the enactment of the Food and Drugs Act, and subsequent thereto, claimant, and other manufacturers, have produced and sold, in various parts of the United States, vinegar in large quantities, and to a certain extent a beverage made from evaporated apples as "apple cider vinegar" and "apple cider,"* respectively (Agreed Statement of Facts, Paragraphs 9-10), (Rec. pp. 12-13).

Furthermore, the general definitions, the standards, and the circulars issued by the Department of Agriculture, each defining "Vinegar" as the product realized from the alcoholic and subsequent acetous fermentation of the *expressed juice of apples*, do not support such a theory unless the word "apples" is limited and qualified by interpolating the words "fresh" or "unevaporated."

On proceedings in error, instituted by the claimant, Douglas Packing Company, the Circuit Court of Appeals for the Sixth Circuit, reversed the District Court, holding, in effect, that apples, and the juice thereof, being the exclusive product from which claimant's vinegar was manufactured, there being no substitution, the vinegar was apple cider vinegar, and therefore not misbranded, saying—

> "Definitions of cider, which include the method or process of its manufacture, written long before public needs required the conservation of our food products, are not helpful to the determination of the question presented in the instant case. Even these definitions call only for the juice of apples, and do not literally exclude the pressing of apples dehydrated and later hydrated in equivalent proportions. The missing and essential element for the

Government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. * * * In the present case it is conceded that this identical product has been sold and accepted by the trade under this name in great quantities for many years and without challenge until now. While there is nothing in the agreed statement of facts to show how far this acceptance has been with knowledge, yet the court cannot judicially know that this acceptance was so wholly without knowledge of the facts as to be unimportant." (Rec. p. 33.)

"*The important question in each case is whether the product is the identical thing that its brand indicates.* If it is the identical thing indicated by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant.

It appears from the agreed statement of facts that the cider from which this vinegar was made, was manufactured from apples and from nothing else. The process of its manufacture differed from the usual method only in so far as necessary to preserve the fruit. This was accomplished by the evaporation process above described. When a quantity of water equal to the amount evaporated is added to the evaporated apples and pressed therefrom it combines with and carries the solvent properties of the apples just the same as in the original state, or if not exactly and identically the same, so near as to defy the science of chemistry to discover the difference. This is the full scope and effect of the dehydrating process as appears by the agreed statement of fact.

The conservation of our food products is of some concern to the public and, perhaps, second in importance only to the demand for pure and unadul-

terated food. It is perfectly apparent that the apple season is altogether too short for the economical manufacturing of the crop, during the season, into cider vinegar in sufficient quantities for public consumption. Therefore an efficient and harmless method of preserving the fruit until it can be used for this purpose is in the direct interest of the public, *and if this method has accomplished that object without change in the product, it should be encouraged rather than condemned.*" (Rec. pp. 31-32).

A petition for re-hearing was filed by the Government and refused, and the application was then made to this Court for a writ of certiorari, which was granted.

The Government is contending, as one of its assignments of error, that the Circuit Court of Appeals erred in holding that the District Court's judgment of misbranding was not sustained by the stipulated facts and the reasonable inferences deducible therefrom.

The District Court found that the samples submitted showed some slight differences in taste and color, but that all, whether made from apples that had been evaporated or apples that had not, tasted like cider and vinegar. No preference was indicated. The trial Court was reversed, as we before stated, for the reason that to find that nothing is apple cider unless expressed from fresh apples is wholly inconsistent and contrary to the facts in the case.

It is true that the case being tried upon an agreed statement of facts, the parties made the District Court the arbiter of those facts. This does not mean, however, that if the trial Court's decision is against the weight of the evidence, based on inferences contrary to and unsupported by the facts, that the appellate court may not reverse the decision.

STATEMENT OF FACTS.

The Government and claimant collaborated in preparing a statement of facts which eliminated all unimportant and irrelevant matters, and the case was tried to the Court on that agreed statement of facts.

In its brief the Government submits a digest of that statement, omitting therefrom certain facts which it may now consider unimportant, but which we regard as necessary and essential to a complete consideration of the case. The agreed statement is short, and for accuracy and convenience, we ask the Court's indulgence if we reproduce it in full and refer to it hereafter in our brief by paragraph number rather than by page of the record.

"STATEMENT OF FACTS.

(1) Claimant, the Douglas Packing Company, is a New York corporation, with its principal office in the City of Rochester, New York, and with factories at Fairport and Canastota, New York. *It is now and has been since January first, 1906, engaged in manufacturing food products from evaporated and unevaporated apples.* From *fresh apples* it manufactures Apple Cider and Apple Cider Vinegar, and from the *evaporated apples* it manufactures, by a process which is fully described in the section numbered (4) hereof products which it designates as 'Apple Cider' and 'Apple Cider Vinegar.' *From the pulp of unevaporated apples and the pulp of the evaporated material* it manufactures a product which it calls 'Pectin.'

(2) During the apple season, between *about September 25th and December 15th*, sound, mature, unevaporated apples are used by claimant, and for the balance of the year evaporated apples of like quality, including as large a portion thereof as claimant can manufacture in its own evaporating

plants, located, one in Vermont, one in Massachusetts and one at Canastota, New York.

(3) With such apples as are evaporated by claimant the most approved process for dehydrating fruits is used. In dehydrating, small quantities of sulphur fumes are used to prevent rot, fermentation, and the consequent discoloration. *The principal result of the dehydration process is the removal of about eighty per cent. (80) of the water.* Whether and to what extent any other constituents of the apple are removed by the process of dehydration is not wholly beyond controversy; in the present state of chemical science no accepted test or method of analysis is provided, so far as the parties to this controversy are advised, for determining to what extent any constituents of the apple other than water are removed by the process of dehydration. *Only mature, sound fruit, free from rot and ferment, can be economically and advantageously used.*

(4) In manufacturing from evaporated apples, claimant places in a receptacle a quantity of such evaporated apples to which an amount of pure water substantially equivalent to that removed in the evaporating process has been added. A weight of more than one (1) ton is then placed on top of the apples and a stream of water, under a sufficient head, introduced through a pipe at the top of the receptacle, is applied until the liquid, released through a vent at the bottom of the receptacle, which vent opens as the stream of water is applied and closes as it ceases, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar.

Such liquid, which is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used, carries a small and entirely harmless quantity of sulphur dioxide, which is removed during the process of fining and

filtration, by the addition of barium carbonate, or some other proper chemical agent, which by precipitation eliminates such sulphur compounds.

The liquid is then subjected to alcoholic and subsequent acetic fermentation in the same manner followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples.

Claimant employs the same receptacles, equipment and process of manufacturing for evaporated as for unevaporated apples, except that in the case of evaporated apples, pure water is added as aforesaid, and in the process of fining and filtration an additional chemical agent is used to precipitate any sulphur compounds present and resulting from dehydration.

After fining and filtration, the resultant liquid obtained by claimant upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except that the liquid made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by the libellant that this trace of barium renders the product deleterious or injurious to health.

The vinegar made from the resultant liquid is similar in taste and in composition to the vinegar made from unevaporated apples, except that the vinegar made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by the libellant that this trace of barium renders the product deleterious or injurious to health.

It is conceded that the vinegar involved in this proceeding is vinegar made from dried or evaporated apples by substantially the foregoing process.

(5) *There is no claim by libellant that the vinegar manufactured by claimant, and seized in the respective actions in this jurisdiction, is inferior to that made from unevaporated apples.*

(6) *Since January 1, 1906,* until the commencement of this action, claimant has sold, throughout the United States, its product, manufactured from unevaporated as well as evaporated apples, as 'Apple Cider' and 'Apple Cider Vinegar,' selling its vinegar under the brand 'Excelsior Brand Apple Cider Vinegar Made from Selected Apples,' or 'Sun Bright Brand Apple Cider Vinegar Made From Selected Apples.' At the time of the commencement of this action, claimant was so manufacturing and selling about 100,000 barrels of vinegar a year.

(7) Each of the parties hereto may submit such exhibits, properly labeled and identified, as they desire of the liquids from unevaporated apples and evaporated apples, including samples of the vinegar seized in this jurisdiction.

(8) It is not disputed or questioned in this case that the juice of unevaporated apples, when subjected to alcoholic and subsequent acetous fermentation, is entitled to the name 'apple cider vinegar.'

(9) *For several years prior to the enactment of the Federal Food and Drugs Act and subsequent thereto, vinegar in large quantities and to a certain extent a beverage, made from evaporated apples, were sold in various parts of the United States as 'Apple cider vinegar' and 'Apple cider,' respectively, by many manufacturers,* including the American Fruit Products Company, of which Company Robert Douglas, President of claimant company, had been Production Manager. The American Fruit Products Company operated eleven plants located in New England, New York and Michigan.

(10) *Since January 1, 1906, the claimant has manufactured such products and sold them labeled 'Apple Cider Vinegar' and 'Apple cider,'* respectively, and in doing so acted in good faith.

The United States Department of Agriculture has never sanctioned such labeling and its attitude with reference thereto is evidenced by the definition of 'apple cider vinegar' set forth in circulars 13, 17, 19 and 136 of the Office of the Secretary of the United States Department of Agriculture and Food Inspection Decision 140.

(11) From the report of the United States Census Bureau it appears that in 1910 there were 430 manufacturers of cider and vinegar, and the value of the product manufactured was $2,254,000.-00 and from the report of the Census Bureau of 1920, there were 720 engaged in the manufacture of cider and vinegar, and the value of the product manufactured was $24,671,000.00."

Claimant is one of the largest manufacturers of apple cider vinegar in the United States, and since prior to 1906, *in common with many other vinegar manufacturers*, has been making vinegar *from apples which have been preserved through evaporation as well as from unevaporated apples.* The vinegars of claimant in each instance are manufactured *by the same process, in the same receptacles*, and except for the harmless trace of barium present in that made from apples which have been evaporated (the Government making no charge by reason of this barium), *are alike in taste, composition, color and analysis.* The vinegars are uniform products manufactured during the apple season, from apples which have not been evaporated and during the balance of the year, from apples which have been evaporated, the process of manufacturing, and not the finished product, varying according to the season, and are, therefore, all labeled "Excelsior Brand Apple Cider Vinegar, made from Selected Apples," or "Sun Bright Brand Apple Cider Vinegar made from Selected Apples." (Statement of Facts, Paragraphs 1 and 4).

These labels and brands, through use for the past eighteen years, or more, on this uniform vinegar, have consequently acquired great value, and to require claimant now to distinguish that part of its vinegar made from apples which have been subjected to the process of evaporation from that made from apples which have not, when the vinegars differ only in the process of manufacture, would arbitrarily subject claimant to a great loss incident to establishing new labels and result in no benefit whatever to consumers and purchasers.

The vinegar being the same in each instance, and the purchaser being concerned only with the *quality, character* and purity of the ultimate product, any labeling requiring a distinction between identical products, because of process of manufacture alone, should be optional and not compulsory.

QUESTIONS IN THE CASE.

The libel as filed in the instant case charged adulteration and misbranding, contrary to the Food and Drugs Act.

> "ADULTERATION.—In the case of food:
>
> First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
>
> Second. If any substance has been substituted wholly or in part for the article." (Sec. 7, 34 Stat. L. 769).

The District Court found no adulteration, and inasmuch as the agreed statement of facts practically precludes that question, and the Government has abandoned it, we may eliminate adulteration from further consideration.

"MISBRANDING:

Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, * * *

That for the purposes of this Act an Article shall also be deemed to be misbranded:

In the case of food:

First: If it be an imitation of, or offered for sale under, the distinctive name of another article.

Second: If it be labeled or branded so as to deceive or mislead the purchaser, * * *

Fourth: If the package containing it or its label shall bear any statement, design, or device regarding the ingredients, or the substances contained therein, which statement, design, or device shall be false or misleading in any particular." (Section 8, first, second and fourth paragraphs, 34 Stat. L. 769, as amended 37 Stat. L. 416 and 732.)

Conceding that only mature, sound apples, *selected* so as to be free from *rot and ferment* can be evaporated; *that evaporation merely changes the form of the apple* to the extent of removing about eighty per cent. of the water thereof; that the *same receptacles* are used in manufacturing vinegar from apples that have been evaporated as from apples which have not been evaporated; that *the process is identical in each instance,* except that in the case of apples which have been evaporated the slight quantities of sulphur taken up during evaporation are removed, and the water which has been evaporated out is restored, the product in each case being identical except for a harmless trace of barium (and was so found by

the District Court), (Rec. p. 15), the question is whether vinegar so produced through the use of apples which have been subjected to evaporation is misbranded if labeled "Apple Cider Vinegar made from Selected Apples."

Does the fact that the apple, from the time it is picked from the tree to the time it is ultimately dejuiced for vinegar purposes, is held and preserved through evaporation or dehydration rather than by storage in the raw state, it being admitted that dehydration or evaporation removes only a *portion of the water in the apple*, necessarily mean that when this water is restored and the manufacture of the vinegar again taken up and carried through, just as with an apple which had not been evaporated, the vinegar so produced is not entitled to be labeled "Apple Cider Vinegar"?

Is the manufacturer of apple cider vinegar, to be exempt from the charge of misbranding, when using the label "Apple Cider Vinegar made from Selected Apples," limited to the use of the juice of apples which have not been evaporated, to the exclusion of the juice of apples, which, to facilitate preserving and shipping and to conserve the apple crop, have been evaporated, when the vinegar, which is the ultimate product, is in each case pure, wholesome, and to all intents and purposes identical?

Is apple cider vinegar, which is defined as being the product made by the alcoholic and subsequent acetous fermentation of the expressed juice of apples, a product that can be manufactured only from apples which have not been evaporated? Is the term "apples" as so used, a generic or class term, and is it subject to the limitation and strict interpretation which the Government seeks to place upon it, namely, that it means only "fresh" or "unevaporated" apples?

Apple cider vinegar is a manufactured article, twice removed from its original form of apple juice. The manufacturer of all apple cider vinegar starts first with apples evaporated or unevaporated from which is secured juice. The juice, after the alcoholic fermentation of its sugars, becomes hard cider. The hard cider, through oxidation of its alcohol to acetic acid becomes vinegar, and this vinegar, either ultimately, or during the process of its manufacture, by the addition of pure distilled water, is diluted to the acetic acid strength required for condiment purposes. *The juice from the apple which has been evaporated ferments and passes through the same stages in becoming vinegar as does the juice of the apple which has not been evaporated.* Apples, and nothing else, being used in manufacturing both vinegars, in the case of apples which have been evaporated the process varying to the extent only of removing and later replacing part of the water of the apples, the alcoholic and acetic fermentation being the same, the ultimate product must necessarily be the same. To require a label to distinguish identical products solely because of the process of manufacture, is not the purpose or intention of the Pure Food and Drugs Act.

COMMENTS ON THE FACTS.

At all times during the prosecution of this case there has been a determined, studied and well defined effort on the part of our opponents to create the impression that claimant is not regarded by reputable vinegar manufacturers as a legitimate vinegar maker; that claimant manufactures vinegar only from apples which have been evaporated; that its vinegar is a cheap, inferior article; that its vinegar is made from a substance other than apples; that too great an amount of water is used in the

process of manufacture; that its vinegar is a waste vinegar, the by-product of pectin.

In furtherance of this effort, there is a constant endeavor, by inference and otherwise, to give to the plain recitals in the agreed statement of facts, and to some of the court's findings, a strained construction and interpretation.

Not only that we may clearly present the simple question involved in this case, but so that claimant's cause may be fairly considered, all unwarranted impressions should first be eliminated. The record in the case is claimant's best argument, and a most cursory examination will suffice.

Claimant could not produce and market 100,000 barrels of vinegar a year and distribute its product throughout the United States, and be other than a manufacturer in good standing in the trade.

Agreed Statement of Facts, Paragraph 6:

> "Since January 1, 1906, until the commencement of this action, claimant has sold, throughout the United States, its product, manufactured from unevaporated as well as evaporated apples. * * * At the time of the commencement of this action, claimant was so manufacturing and selling about 100,000 barrels of vinegar a year."

Agreed Statement of Facts, Paragraph 10:

> "Since January 1, 1906, the claimant has manufactured such products and sold them labeled 'Apple Cider Vinegar' and 'Apple Cider', respectively, *and in doing so acted in good faith.* * * *"

The 100,000 barrels of vinegar a year includes vinegar made from unevaporated as well as evaporated apples, claimant manufacturing all that it can from unevaporated apples during the apple season.

Agreed Statement of Facts, Paragraph 1:

"* * * It is now and has been since January first, 1906, engaged in manufacturing food products from *evaporated* and *unevaporated* apples. From *fresh* apples it manufactures Apple Cider and Apple Cider Vinegar, and from the *evaporated* apples it manufactures, by a process which is fully described in section numbered (4) hereof products which it designates as 'Apple Cider' and 'Apple Cider Vinegar'. * * *"

Paragraph 2:

"During the apple season, between about September 25th and December 15th, sound, mature *unevaporated* apples are used by claimant, and for the balance of the year *evaporated* apples of like quality."

Paragraph 4:

"Claimant employs the same receptacles, equipment and process of manufacturing for *evaporated* as for *unevaporated* apples."

Paragraph 6:

"Since January 1, 1906, until the commencement of this action, claimant has sold, throughout the United States, its product, manufactured from *unevaporated* as well as *evaporated* apples."

There is no evidence whatever that vinegar made from evaporated apples is cheaper than that manufactured from unevaporated apples. Relative costs do not appear in the case. Is it not more reasonable to infer, from a consideration of claimant's process (if inferences are permitted), that the cost of producing vinegar from apples which have been evaporated is greater, inasmuch as the expense incident to the process of evaporation and the additional storage and handling are not present when the unevaporated apple is used?

It is unequivocally conceded that so much of claimant's vinegar as is manufactured from the apple which has been evaporated is not inferior to that manufactured from the unevaporated apple.

Agreed Statement of Facts, Paragraph 5:

> "There is no claim by libellant that the vinegar manufactured by claimant, and seized in the respective actions in this jurisdiction, is inferior to that made from *unevaporated* apples."

A comparison of the analysis of the sample of vinegar seized in this action with the standard prescribed for vinegar by the Government, establishes that the vinegar seized is superior to prescribed Government standard.

Government Standard	*Analysis of Vinegar Seized*
Alcohol—Amount not specified	1.47
Acid, grams per 100 cc. not less than 4.0..	4.44
Solids, grams per 100 cc. not less than 1.6	2.33
Reducing sugars—Actual amount not specified, but must be not more than one half of the total solids	0.39
Non-sugar Solids, is the difference between total solids and the reducing sugars. Actual amount not specified..	1.94
Ash, grams per 100 cc. not less than 0.25..	0.40
Percentage of ash in non-sugar solids,— Not specified	20.6%
Alkalinity of Soluble Ash, not less than 30.00 cc. of decinormal acid	40.0 cc
Percentage of reducing sugars in solids, not more than 50%	16.7%
Soluble $F_2 O_5$ (phosphoric acid) milligrams per 100 cc. not less than 10.	10.1

Polarization, must be laevo-rotatory, that is, must show a minus polarization	— 1.5°V
Ratio non-sugar solids to the sum of alcohol and acid—Figure not specified	32.8%
Sulphates—Not specified	Slightly above normal

Furthermore, the New York case, in which case claimant's present label was sustained and which we will cite later, conclusively established the excellence of claimant's product.

Judge Westenhaver did not find, after tasting the various samples submitted, that the vinegar seized was inferior in taste or flavor to that made from fresh apples. His only finding was that in all the samples submitted there were slight differences in taste and color (Rec. p. 15), but *all* samples had the appearance and taste of cider and vinegar. *No preference was expressed.* A difference in appearance and taste would be apparent in any samples of ciders and vinegars, whether the samples were all made from apples which had been evaporated or not, since the taste of all cider or vinegar will vary, depending on whether it was made from a sour or sweet apple, early or late apple, green or ripe apple, sound or imperfect apple, selected or cull apple, the season when made, whether aged in barrels, the extent of fermentation, the manner in which it was bottled, and how it was handled generally. It is a matter of common knowledge that, as vinegar stands or is exposed to the air, it necessarily changes in color through further oxidation.

There is no justification whatever for the comment that any difference in the taste of the vinegars is due to the escape "of congeneric substances in dehydration,"

for the Agreed Statement of Facts, in paragraph 4, finds the only difference between the vinegars is that one carries a trace of barium, which trace in no way affects the character or quality of the vinegar or renders it deleterious or injurious to health.

Furthermore, in Paragraph 3 of the Agreed Statement of Facts it is admitted that

> "in the present state of chemical science no accepted test or method of analysis is provided, so far as the parties to this controversy are advised, for determining to what extent any constituents of the apple other than water are removed by the process of dehydration. * * * The principal result of the dehydration process is the removal of about eighty per cent. of the water."

Under such conditions is it reasonable to suppose that there would be any noticeable difference between the taste, flavor or color of vinegar made by either process?

Again, the fact that only perfect fruit can be evaporated (Agreed Statement of Facts, Paragraph 3):

> "Only mature, sound fruit, free from rot and ferment, can be economically and advantageously used."

would necessarily mean, (if we may again indulge in inferences), that the vinegar from the apple which is evaporated would be superior to the other, especially in view of the so-called general knowledge as to the character of cider apples.

Cider apples, loaded in bulk and carried in box cars for weeks after loading, subjected to various temperatures, necessarily are bruised, and rot and decay, and a large part of the value of the apple is thus lost which otherwise is saved through evaporating the apples at the

point of production and shipping in the preserved condition.

The Agreed Statement of Facts, as we have already observed, states repeatedly that the only substance used by claimant is apples. In the apple season fresh apples are used, thereafter, evaporated apples of like quality are used.

Agreed Statement of Facts, Paragraph 2:

> "During the apple season, between *about September 25 and December 15th,* sound, mature unevaporated apples are used by claimant, and for the balance of the year evaporated apples of like quality, including as large a portion thereof as claimant can manufacture in its own evaporating plants, located, one in Vermont, one in Massachusetts and one at Canastota, New York."

The quantity of water in the vinegar manufactured from evaporated apples is the same as that in the unevaporated apples.

Agreed Statement of Facts, Paragraph 4:

> "In manufacturing from evaporated apples, claimant places in a receptacle a quantity of such evaporated apples *to which an amount of pure water substantially equivalent to that removed in the evaporating process has been added.* * * *"

And the resultant liquid in the case of evaporated apples (Agreed Statement of Facts, Paragraph 4)—

> "* * * is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used, carries a small and entirely harmless quantity of sulphur dioxide which is removed during the process of fining and filtration by the addition of barium carbonate, or some other proper chemical agent, which by precipitation eliminates such sulphur compounds."

The sulphur dioxide present in the juice is removed as part of and during the process of fining and filtration, with a view to clarifying and producing as uniform and as pure a juice as possible, and with no ulterior motive whatever. This trace of sulphur dioxide has served its purpose in preserving the apple, which is the container for the juice, and, its presence being no longer required, it is removed from the juice just as are the bits of pulp, or any other substances or particles therein, not useful in or essential to the juice for vinegar purposes.

Our opponents say finally:

> "No one ever heard of any substance, about seventy-five per cent. of which is a substitute, being called cider, until some manufacturer of pectin, desired to realize additional profits by selling this by-product as genuine cider." (Government Brief, Page 48.)

Later, in our brief, we will show that the Department of Agriculture advocates a process for removing 75 to 80 per cent. of the water from cider in order to better preserve it, approves restoring the water when the cider is to be used, and sanctions the sale of the restored product as "cider" or "fresh cider."

Claimant manufactures pectin, but the pectin is manufactured as a *by-product of the vinegar,* and from a material which remains after the production of vinegar, which material was formerly wasted and lost.

The Agreed Statement of Facts rebuts conclusively the insinuation that claimant manufactures vinegar only from evaporated apples for the purpose of securing pectin.

Agreed Statement of Facts, Paragraph 1:

"* * * From the pulp of *unevaporated* apples and the pulp of the *evaporated* material it manufactures a product which it calls 'Pectin'."

The pulp remaining after the unevaporated apple is dejuiced is just as useful and valuable for manufacturing pectin as that from the evaporated apple.

"Pectins," as defined in the New International Encyclopedia, are

> "Substances of general distribution in *ripe fruits* and rather commin in *organs of flowering plants.* They probably originate from the pectose of the middle lamella of cell walls and are found in great abundance in fruits *during ripening.* * * * In boiled concentrated fruit juices they also coagulate probably independently of enzymes and along with sugars, organic acids and other substances constituting jellies."

"Pectose," "pectase," "pectine," "pectic acids," are defined in the Americana Encyclopedia as

> "A group of closely related substances found in the cell walls of certain *fruits and vegetables* during various stages of ripening, to which the power of forming a jelly is due."

Is the inference justified therefore that claimant's vinegar is a by-product or waste product incident to the manufacture of pectin from the pulp of evaporated apples or that pectin is procurable only from evaporated apples?

ARGUMENT.

Considering then, only the real issues developed from the actual facts, we have the simple question of whether a product manufactured by different methods shall be labelled to indicate the process. So long as the

purchaser is securing the product which he is interested in buying, of what consequence is the process of manufacture, provided it is sanitary, clean and pure, and does not alter the character or quality of the article?

Notwithstanding vinegar made from the juice of apples which have been evaporated is identical to that made from the juice of apples which have not been evaporated, the Government insists that because the process differs only through holding the apples in the one case in an evaporated state before pressing out the juice, the vinegars should bear distinctive labels. In support of its position, it quotes the definitions of "Cider" and "Vinegar" in Webster, the Encyclopedia Britannica, Nelson's Encyclopedia, The Farmers' Bulletin, and in the cases of *Eureka Vinegar Company vs. Gazette Printing Company*, 35 Fed. 570, *Monroe Cider Vinegar & Fruit Co. vs. Riordan*, 280 Fed. 624, 626, 627, and *Sterling Cider Co. vs. Casey*, 285 Fed. 885. To these may be added the definitions in Century, Standard, Murray, the Encyclopedias Americana and New International, in all of which appear only the words "expressed juice of apples." Nowhere, not even in the very standards prescribed by the Department itself, is the term "expressed juice of apples" limited to the expressed juice of "fresh" or "unevaporated" apples. For the Government to maintain its claim on the definitions alone, it must do so, not by standing on the definitions and standards, as written, but by qualifying them through the addition or reading in of the words "fresh" or "unevaporated" to qualify the word "Apples."

The case of *Smith vs. Rheinstrom*, 65 Fed. 984, is cited, as defining juice but an examination of the facts in that case, and a comparison with the instant case, readily shows its inapplicability.

In the *Rheinstrom* case the Tariff Act imposed a duty on cherry juice, a finished product. When eighty per cent. of the water was extracted from the juice, a gallon of the concentrated juice for revenue purposes had a greater value than a gallon of the juice in its original form. The concentrated juice differed in value, in alcoholic content, in specific gravity and color, and since the Tariff Act was one based on the value of the product and alcoholic content, necessarily the concentrated juice would carry a higher rate, and for *dutiable* purposes was a different article. To carry out the analogy, so far as the instant case is concerned, if the importer had restored water to the concentrated juice and added no alcohol, there would be no question but the article would have been admitted as cherry juice.

The *Rheinstrom* case was decided in 1895, and in November, of 1921, in the case of *Tower & Sons vs. United States*, Vol. 40, Treasury Decisions, T. D. No. 38,948, the United States Court of Customs Appeals, consisting of Presiding Judge Devries and Associate Judges Smith, Barber and Martin, considering with reference to cider instead of concentrated cherry juice the same tariff provision discussed in the *Rheinstrom* case, held that boiled cider, reduced to one-fifth in volume of the original, should be rated as "cider." Judge Martin, writing the opinion of the Court, says:

> "The importation consists of apple juice which has been boiled down to about one-fifth of its original volume, having now a consistency like thin maple syrup, containing no foreign ingredient and having suffered no chemical change whatever, except possibly a negligible alteration of its sugar content, such as is unavoidable in the operation. Its present consistency prevents its use as a beverage *but it may be restored to that use by simply*

adding water to it and that is one of the recognized and considerable uses of the importation in domestic trade. * * * It is obviously true that the appellants, by importing boiled cider rather than fresh cider, save in the cost of containers, in freight, cartage, storage, and, according to their claims, in the assessment of duties. But all of these facts were within legislative cognizance when the paragraph was enacted and when the term 'cider' was written into the provision without words of limitation it must be assumed that it was intended to include all kinds of cider, notwithstanding the fact that some might be reduced in volume by means of boiling."

Is not the language of the Court in the *Tower* case most applicable to the instant case? All of the definitions refer to the expressed juice of apples, and is it not fair and reasonable to say that the word "apples" in the definitions contemplates all kinds of apples,—fresh, evaporated, ripe, green, etc?

In the instant case, concentrated apple juice is merely a stage in the process of the manufacture of vinegar. The finished product is the juice of an apple fermented finally into vinegar and the acetic strength reduced through the addition of water.

So long then, as this juice is expressed or pressed from the apple, and that claimant presses out the juice is not questioned, nothing else is required, and since evaporation merely concentrates the juice and does not destroy it, claimant's vinegar complies with all definitions.

The Government, at Page 18 of its brief, says:

"The evaporated apples used by claimant retain twenty per cent. of the natural quantity of water. By subjecting them to high pressure a viscid exudation can be squeezed out of them. Can

such exudation be properly called the 'juice' of the apples? There is no difference between such a product and that procured by expressing the juice and reducing it eighty per cent. by boiling. In each instance eighty per cent. of the water content has been removed."

The Treasury Decision heretofore cited answers the query.

Again, at Page 20 of its brief, the Government states:

"No substance can be genuine apple juice other than that actually expressed from the apple. Such juice is composed of water and solids, one of which is sugar. If after the removal of the water squeezed from the apple and the substitution of other water, it remains apple juice, then the sugar might be removed and other sugar substituted, and it would still be apple juice. And thus, one by one, every ingredient might be removed and an equivalent substituted, and it would still remain apple juice, though not a drop or a particle of it had ever been inside an apple."

In 1914, the Department of Agriculture, in its Year Book, published an article by H. C. Gore, Chemist in Charge, Fruit and Vegetable Utilization Laboratory, Bureau of Chemistry, entitled "Apple Sirup and Concentrated Cider: New Products for utilizing Surplus and Cull Apples."

"Twenty-five per cent of the apples grown in American orchards never figure in the food supply of the nation, according to estimates of specialists who have been studying apple production. These waste apples are either good fruit for which the farmer can find no profitable market and therefore allows to rot under the trees, or surplus culls, left

undisposed of after all demands for vinegar and fresh cider have been met. Food conservationists who have long been studying the problem of reducing this waste are inclined to attribute the loss of good fruit, in some measure at least, to defects in existing marketing systems and the failure of orchardists to avail themselves fully of cold storage as a means of keeping fruit from the season of plenty to the season of scarcity and better prices. The problem, however, of turning the culls and the apples too small for retail sale into profit seems to call not for improved marketing conditions, but for the transformation of this material into new forms of food. * * *

The problem, therefore, was still unsolved when a series of apple crops larger than the average resulted in an even greater waste than usual and stimulated the Department of Agriculture to institute systematic studies into methods of treating apple juice. * * * After some experiments, the cider was frozen solid and the ordinary centrifugal machine long used in the sugar industry was employed as a convenient instrument to separate the sirupy portion of the cider from the water-ice by means of rapid whirling. This process, it was found, permitted the reduction of 5 gallons of cider to 1 gallon of cider concentrate, *which preserved all the original flavor of fresh cider and could be instantly restored to cider by the simple addition of the water that had been extracted.* This product, it was seen at once, was so reduced in volume and weight as to make shipments from apple orchards to the large cities profitable for much longer distances. Laboratory tests bore out the theory that in its concentrated form the cider would keep much longer than in its original condition and in cold storage would keep indefinitely. *The new product thus promises to make fresh cider available at soda fountains throughout the summer months.*" Pages 227-8-9.

Again, at Page 238, in speaking of the concentration of sweet cider by freezing, Mr. Gore says:

"During the apple-harvesting seasons of 1913 and 1914 the department experimented extensively on a commercial method of handling fresh cider so as to reduce its bulk to a point where longer shipment would be possible and also to secure a product that would keep better and could thus be sold over a longer period than is possible *with ordinary apple juice.*

Analyses show that ordinary cider contains from 12 to 14 per cent of solids, mostly sugars, which make up from 10 to 12 per cent, and malic acid. *The remainder of the cider is water, which experiment quickly showed can be withdrawn by freezing. Replacing the water so removed with ordinary drinking water will restore the cider to its original quality.*

After varied experiments it was found that 5 gallons of cider could be reduced by freezing and treatment to 1 gallon of sirupy cider concentrate. * * * When kept cool, as in a household refrigerator, concentrated cider, it was found, would not spoil for many weeks. When kept at or below 32° F. in cold storage it was found that concentrated cider could be kept from one season to the next and thus make *fresh cider* available as a beverage during the summer months. * * *"

Mr. Gore then gives diagrams, costs and the process in detail for freezing cider, and at Page 241 says:

"The fully concentrated cider will be a somewhat thick liquid with the cloudy appearance and color of unfiltered fresh cider. If kept sealed at household refrigerator or in cold-room temperatures, it will keep for weeks. Where allowed to become warm, it will gradually ferment, but will spoil much more slowly than ordinary cider. Concentrated cider intended for use during the following

spring or summer should be put into cold storage at once and kept at or below 32° F. It can be shipped anywhere in winter weather in unheated cars without danger of spoiling. It can be bottled, canned, or shipped in clean kegs. Inasmuch as 1 gallon can represents 5 gallons of cider and the equivalent of 250 gallons of fresh cider can be put in a 50-gallon barrel, the concentrated product can be shipped profitably for much longer distances to market than can the bulky fresh cider. In addition to saving 80 per cent on the freight, the reduction in volume permits the shipper to use containers one-fifth the size, which is an important saving in cooperage. The saving in containers, which have always been relatively expensive items in shipping cider, should alone nearly offset the cost of freezing and concentration. In addition there is the saving of drayage and other handling costs. *On its arrival at the market the retailer can at once restore it to cider by adding 4 parts of water, or he can sell it in the convenient concentrated form to his customers.* * * * In this way concentrated cider made in the fall can be kept over and used in the soft-drink trade during the hot months, at soda fountains, and in the home. * * *"

Page 244:

"A process which will make pure, *fresh cider* available as a summer drink at our soda fountains should open up a new and valuable market for the juice of surplus apples."

Science has discovered no test which indicates that anything more than water is removed from the apple through evaporation. The Department makes no distinction between fresh cider, so-called, and the dehydrated cider restored with water. What difference is there between restoring the water to cider than the water to the juice in the evaporated apple?

If the concentrated cider when the water is restored is real, genuine cider, can it reasonably be claimed the juice of the evaporated apple when the water is restored is imitation instead of genuine apple juice?

It is a matter of common knowledge that the Government advocates the evaporation and dehydration of fruits and vegetables, advertising, and insisting that evaporation and dehydration in no way detracts from the food value, the effect being merely the extraction of a percentage of the water and moisture therefrom. The fruits and vegetables can thus be better preserved; there is less rot, decay and deterioration; the space occupied is reduced, so that cheaper freight rates can be secured and shipments can be made in greater volume and with fewer cars; during the fruit and vegetable seasons the fruits and vegetables can be gathered to better advantage, and through being dehydrated, can be preserved more economically for future consumption.

The inconsistency of the Government in requiring a distinction in the labeling of vinegar made from evaporated and unevaporated apples is again manifest when we consider the regulation in regard to maple sugar, which is another instance identical with the vinegar situation.

The Department, in Circular 136, and its other circulars, in relation to maple sugar, defines it as follows:

> "Maple sugar, maple concrete, is the solid product resulting from the evaporation of maple sap or maple sirup."

Maple sirup is defined as,

> "Maple sirup is sirup made *by the evaporation of maple sap or by the solution of maple concrete,* and contains not more than thirty-five per cent (35%)

of water, and weighs not less than eleven (11) pounds to the gallon (231 cu. in.)."

Under that Circular, maple sirup made from maple concrete, as well as *maple sap,* is entitled to be labeled "Maple Sirup." The maple concrete may be said to be but a step in the process of manufacturing maple sirup. *What difference can there be between the process of maple sap to maple sirup and the juice of the evaporated apple to cider? Maple sirup may be made in one uninterrupted process, that is, from sap to sirup, or the intermediate stage may be invoked, of securing the sugar by evaporation, holding the sugar and later making the sirup.* We cannot conceive of a situation more comparable to the vinegar process.

The Government, in commenting on this regulation, at page 51 of its brief, seeks to avoid the parallel by claiming a difference between the words "juice" and "sirup." The similarity in the comparisons is not juice and sirup, but juice and sap and sirup and vinegar. It also answers that if the public knows that genuine maple sirup is made both ways and recognizes one *as good as the other,* that either can be branded "maple sirup."

By the agreed statement of facts it appears that for the past twenty years vinegar made from evaporated apples has been marketed and sold in large quantities, that it is as good as vinegar made from the juice of apples which have not been evaporated. Is there anything in the record to show that the public is unacquainted with these facts? Claimant is condemned for urging the very arguments the Government insists upon as justifying its sirup regulation.

The Government, at page 36 of its brief, cites the ruling of President, now Mr. Chief Justice Taft, with reference to the branding of whiskies.

Claimant is heartily in accord with this ruling. Claimant's vinegar is apple cider vinegar whether made from either kind of apples, and inasmuch as the public wants apple cider vinegar and is getting apple cider vinegar, there is no deceit. The public is concerned with the product rather than with the method of manufacture. As Mr. Chief Justice Taft said, in considering the different and improved processes for distilling whiskey, and the public's knowledge thereof:

> "If high wines at from 140° to 160° when reduced to potable strength and containing a very small quantity of fusel-oil and flavored by brown sugar are whiskey, as he has found, then the mere improvement in the process by continuous distillation, so as to give a product of from 160° to 188° proof and still further to reduce its fusel-oil, is not to change its whole nature, or to make what was genuine whiskey imitation whiskey, because of a slightly reduced trace of one ingredient. *The distinction is too impracticable in my judgment for the execution of the law. It may be that the public were not fully or exactly advised as to the change in process when it was made, but the change in the process was slight and affected economy in the production rather than the flavor of the product, and if the public detected no difference in the flavor in the product of the improved process, as they did not, but continued for forty years to regard it as the same, there was no deceit in continuing to call whiskey that which was thus merely improved in its manufacture without substantial change of composition of flavor.*"

Is not this exactly what claimant is insisting, and what the Circuit Court of Appeals below held in the instant case?

> "The important question in each case is whether the product is the identical thing that its brand indicates. If it is the identical thing indicated

> by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant." *Rec. p. 31.*

The Government's reference to spirits made from molasses (page 37 of its brief), is entirely beside the instant case. Whiskeys are made from grains and rum from molasses. The primary substance in each case is different. They, therefore, require different brands in the absence of having acquired a common trade name. Apple juice is apple juice, whether from evaporated or unevaporated apples, and there is, consequently, no aptness in the analogy which the Government there seeks to draw.

Under Sections 3 and 4 of the Food and Drugs Act, the enforcement thereof is entrusted to the Secretaries of Agriculture, the Treasury and Commerce and Labor, jointly, and the extent of the authority of the officers charged with the administration of the Act is clearly defined and closely limited. The rules and regulations promulgated by the three Secretaries are limited, and the validity of any of them may be challenged by the parties interested in the proceeding. They represent, in other words, the opinion only of the Department in regard to adulteration and misbranding.

On February 27, 1912, Food Inspection Decision No. 140 was issued by the Board of Food and Drug Inspection, and is the first attempt on the part of the Department to give vinegar made from apples which have been evaporated a separate classification. It is under this F. I. D. that the Government now charges misbranding.

> "1. *Vinegar, cider vinegar, apple vinegar,* is the product made from the alcoholic and subsequent acetous fermentations of the *expressed juice of apples.*

2. *Wine vinegar, grape vinegar,* * * *

3. *Malt vinegar,* * * *

4. *Sugar vinegar,* * * *

5. *Glucose vinegar,* * * *

6. *Spirit vinegar, distilled vinegar, grain vinegar.* * * *

Several questions regarding these definitions have been raised and after investigation the board has reached the following conclusions:

Meaning of the term 'vinegar.'—While the term 'vinegar' in its etymological significance suggests only sour wine, it has come to have a broader significance in English-speaking countries. In the United States it has lost entirely its original meaning and when used without a qualifying word designates only the product secured by the *alcoholic and subsequent acetous fermentation of apple juice.*

'Second pressings.' It is held that the number of pressings used in preparing the juice is immaterial so long as the pomace is fresh and not decomposed. The practice of allowing the pomace from the presses to stand in piles or in vats for a number of days, during which time it becomes heated and decomposed, and then pressing, securing what is ordinarily called 'second pressing', in the opinion of the board produces a product which consists in whole or in part of a filthy and decomposed material and is therefore adulterated.

Vinegar from dried-apple products.—The product made from dried-apple skins, cores, and chops, by the process of soaking, with subsequent alcoholic and acetous fermentations of the solution thus obtained, is not entitled to be called vinegar without further designation, but must be plainly marked to show the material from which it is produced. The dried stock from which this product is prepared must be clean and made from sound material. * * *

Acid strength.—All of the products described above should contain not less than four (4) grams of acetic acid per one hundred (100) cubic centimeters." *Food Inspection Decision, No. 140.*

This F. I. D., while appearing to approve the definition of "apple vinegar" as given in Circular No. 19, which was in effect at the time the Pure Food and Drugs Act was passed, varies that definition and defines it as being the product made "from" instead of "by" the alcoholic and subsequent acetous fermentations of the "EXPRESSED juice of apples," instead of "the juice of apples."

The definition in F. I. D. 140 does not change Circular 19, which was in effect at the time of the publication of this F. I. D. While it may represent the interpretation which the Board of Food and Drug Inspection placed upon the standard prescribed by Circular 19, it is not, nor has it become a standard, and at the time of its issuance did not alter, but merely attempted to interpret, the standard prescribed by Circular 19.

Circular No. 136, which was properly promulgated and adopted May 14, 1919, *seven years after* F. I. D. 140 was issued, entirely ignores the interpretation placed on the definition in Circular 19 by F. I. D. 140, and defines cider vinegar as being made from the "juice of apples," and not the "expressed juice of apples," *and creates no separate class for vinegar from dried apple products,* This would indicate that the Secretaries in re-adopting and approving the Standard in Circular 19, by ignoring the interpretation placed thereon by F. I. D. 140, did not intend that this F. I. D. should be further considered. Had it been otherwise, the standard prescribed by Circular 136 would have been in the words, and as indicated by F. I. D. 140. It is evident, therefore, that the definitions and standards, shown in F. I. D. 140, have been

superseded and are overruled and disregarded by Circular 136.

The term "apple," as used in the Department's standards, is not qualified or limited by such words as "fresh" or "unevaporated." It is intended as a generic or class term only, signifying the primary source from which the substance must come out of which the vinegar is made, in order to justify the use of the term "apple cider vinegar." As such, it would include all kinds of apples, ripe, green, storage, fresh or evaporated. The definitions for "cider" and "vinegar" regard apples only as the primary source from which the juice of apples is to be obtained, and it is from this juice, through alcoholic and subsequent acetous fermentation, that cider and vinegar is secured. The clear meaning and only requirement of the regulations and definitions is that apple cider vinegar shall be an apple derivative. Certainly an apple which is in an evaporated state is none the less an apple.

Evaporation removes about seventy-five per cent. of the water in the apple, the remaining twenty-five per cent. carrying in solution all of the soluble parts of the apple, is none the less juice by reason of that fact. It is simply a richer, more sirupy juice, but is nevertheless juice.

The Allen patent for a dry mince pie compound recognizes that cider or juice remains in the apple after evaporation. In *Dougherty vs. Doyle*, 63 Fed. 475, involving the Allen patent, it appears that the water was evaporated from the apple for the purpose, as stated by the patentee,

> "so that I have the cider in my compound without useless water, which may be added when the consumer wishes to use it."

The elimination of part of the water of the apple in the manufacture of vinegar is immaterial. Vinegar produced from unevaporated apples is always reduced by the addition of water. The content of acetic acid is so great that, unless reduced, the vinegar would not be a condiment, and the regulations for the labeling of vinegar provide for stating the per cent. to which the vinegar is reduced by the addition of water.

Any argument, therefore, on the part of the Government which seeks to claim that the water in the apple is restricted to native water becomes immaterial, for what difference is there whether, in securing the necessary acid content for the vinegar, water is added early or late in the process of manufacture? It is a well known fact that, in the manufacture of cider or vinegar from apples, fifty per cent. in water of the weight of the pomace resulting from the first and subsequent pressings is added to it before the second and subsequent pressings are made. The New York case (which we will later quote in detail) comments on the general practice of second pressings of the pulp of unevaporated apples after adding water. Second pressings are also sanctioned by F. I. D. 140, as heretofore noted.

The regulations permitting second pressings without a distinguishing label, and compelling a distinguishing label when apples which have been evaporated are used, is another illustration of the inconsistency in the Department's regulations. What possible difference is there in theory or in principle, between the addition of water to the pomace after the first pressing and replacing the water in evaporated apples?

The New York State Courts, within the past year, have passed on the precise question involved in the case at bar, namely, whether vinegar made from apples that

have been evaporated is apple cider vinegar made exclusively from the pressed juice of apples. (In view of the importance of this case, and its bearing on the present controversy, we shall quote in detail the opinions of the different Courts during the various stages of the case.)

The evidence in that case is most complete in that samples from the juice of apples that have been evaporated and of apples that have not, as well as samples of the juice of both kinds of chops, cores and skins, were submitted, together with samples of the ciders and vinegars from each. A comparative analysis of all of the samples was in evidence and claimant's process of *pressing* out the juice was explained and described to the most minute detail.

The trial Court, at the conclusion of all the testimony, directed the jury to return a verdict for the State, Mr. Justice Thompson delivering the opinion:

> "I am unable to conform my mind to the views of counsel. I feel that the statute was designed to secure to the consumer under this rule that the legislature has made, the delivery of vinegar derived solely from the juice of the fresh fruit, when he shall purchase the vinegar, and I feel that that is the attitude of the court and spirit of the law at this time, in the light of the more modern Sales Act or Personal Property Law that we have in all States, and the pure food laws and farm and market laws, and the fact that the producer and consumer are so much more remote from each other in these times than they were in years past. I feel that in view of these things the law requires under these conditions, and the tendency of judicial action is, that these laws must be strictly construed and strictly interpreted and enforced. So my ruling in this case may be stated and made a part of the record to the effect, that I grant this motion upon the as-

sumption that this statute prohibits the sale of cider made from evaporated fruits, under this sort of branding, at least, and that it only authorizes under this branding, or this marking, the sale of vinegar made from the natural fruit without the intervention of the process of evaporation."

The Douglas Packing Company moved for a new trial upon exceptions taken at the trial, and upon its application the trial Court ordered the motion for a new trial to be heard in the first instance in the appellate division. The appellate division of the Supreme Court affirmed the decision without opinion. Mr. Justice Clark, however, filed a dissenting opinion:

"The primary purpose of the statute (Sec. 72 of the Agricultural Law, now Sec. 209 of the Farms & Markets Law), requiring that containers of vinegar should be branded as prescribed in the statute, and that no person should mark or brand as or for cider or apple vinegar any package containing that which is not cider or apple vinegar, was to insure to the public an article that was pure, to the end that the health of citizens would be safeguarded.

There was no evidence in this case that the product of defendant-appellant was not of the finest quality and absolutely pure. The juice of the apple was obtained by pressing, and I cannot see what possible difference it made whether the pressing was by pressure applied from above or below.

Defendant's vinegar was made from the juice of apples, evaporated of course, but from apples just the same, and the "acidity, solids, and ash" of both "have been derived exclusively from the apples from which they were fermented."

The vinegar in question was made exclusively from the pressed juice of apples. It was not pressed in the old fashioned way perhaps, where rotten, wormy, and dirty apples and skins and cores were ground up together and the juice pressed out, and vinegar made from it, but it was made from the pressed juice of evaporated apples which retained all the juice of the apple and from which only a portion of the water had been removed by evaporation.

The primary source from which this vinegar came was apples. The product was in no way adulterated. It was conceded on the argument by the learned attorney general that defendant's product was pure. By the process of evaporation water had been removed from slices of selected apples by evaporation, and before the product in question had been obtained nothing but water had been added.

It was not river water as was the fact in the case of *People vs. Niagara Fruit Co.*, 75 A. D. 11, on which respondent relies. I do not think that case is a controlling authority here. The juice from which the vinegar was made in that case was extracted from apple cores, skins, and small pieces of apples which had been evaporated, and then the evaporated article had been soaked in river water, and coloring matter had been added to make the product look like cider vinegar. It was of course impure.

Here the product was concededly pure and the only fault the respondent can find is that the packages in which it was shipped were not properly branded. In other words, respondent claims it should have been plainly stated on the containers that the vinegar was made from evaporated apples.

Respondent is seeking to enforce a statute that is highly penal in its nature, and it should not be construed against the citizen and in favor of the state.

People v. Briggs, 193 N. Y. 459

People v. Braested, 30 A. D. 401

The cider from which this vinegar was made coming exclusively from the juice of apples pressed or forced out as described by the witnesses and carried in solution in the native water of the apple and without the addition of anything but pure water, and the vinegar being absolutely pure, I do not think the statute was violated.

People v. Heins Co., 90 A. D. 408

To outlaw defendant's fine product made from apples exclusively with no adulteration, and with nothing added except pure water, and for no reason except that the containers were not branded with the statement that the product was made from evaporated apples, strikes me as going too far in construing a penal statute in favor of the state.

If defendant's product had been adulterated in any way, or was in the slightest degree impure, or if it contained any deleterious ingredients, a different situation would present itself, but where the product was pure, as in this case, and contained no ingredients that would in any way injure the public health, I do not think the spirit of the statute was violated by failing to have branded on the containers the statement that the vinegar was made from evaporated apples.

I therefore dissent and vote to reverse the judgment and dismiss the complaint."

The case was then taken to the Court of Appeals and the lower courts were reversed, Judge Pound dissenting, but writing no opinion. (Syllabus):

> "Under the Agricultural Law (Cons. Laws, ch. 1, § § 70, 71, 72, amd. L. 1916, ch. 125), properly construed, vinegar made from evaported apples, by treating them with a certain percentage of water squeezed out again as apple juice, is 'apple cider vinegar' within the meaning of the statute, and, therefore, defendant, who had made vinegar in this way and offered it for sale branded as 'apple cider vinegar,' is not liable under the statute for improperly branding vinegar. (*People v. Niagara Fruit Co.*, 75 App. Div. 11; affd., 173 N. Y. 629, distinguished.)"

"CRANE, J.

This is an appeal from a judgment recovered in the Supreme Court for a penalty of $50.00 and costs in favor of the plaintiff and against the defendant, based upon a finding that the defendant had improperly branded vinegar in violation of the Agricultural Law. Sections 70, 71 and 72 of the Agricultural Law * * * read as follows:

> '70. Definition of vinegars and adulterated vinegars.—All vinegars made by fermentation without distillation must carry in solution the extractive matter derived exclusively from the substance from which they were fermented. The terms "cider vinegar," "apple vinegar" shall be construed to mean the product made exclusively from the pressed juice of apples by alcoholic and subsequent acetous fermentations, the acidity, solids and ash of which have been derived exclusively the apples from which it was fermented. * * * '"

The case against the defendant is based upon a concession reading as follows:

> "It is admitttd that on or about September 1920, for a valuable consideration, the Douglas Packing Company sold and delivered to one William H. Dunne, a domestic corporation dealing in groceries, in Norwich, New York, eighty barrels of vinegar, a part of which eighty barrels was manufactured from apples purchased by the Douglas Packing Company in Vermont and Massachusetts and then made into the evaporated, unpared apples designated as 'chops'; and that the sample in question was a part of such consignment."

The question presented is whether vinegar made from evaporated apples is apple vinegar made exclusively from the pressed juice of apples. If it is, the defendant has not violated the law in branding his product as apple cider vinegar.

There is no doubt, in this case, about the vinegar being the sole product of apple juice. Neither is there any claim that the defendant's product has been adulterated or discolored. The People have frankly admitted that this case is not one of adulteration, but one of misbranding. The name or brand "cider vinegar" or "apple vinegar" is said to indicate a process as well as a product, and that these terms signify to the public that fresh apples and not dried or evaporated apples had been used. The People also insist that the words of the statute "made exclusively from pressed juice of apples" mean juice pressed out of apples, no matter how old or in what condition, as they are taken from the tree or ground.

We cannot read this statute as having this narrow limitation. The process adopted by the defendant, in a word, is this: The apples have the water taken out of

them by evaporation. In this way they are preserved from rotting. Later they are put in a big vat or tank, water is poured upon them, they are submitted to pressure, and the water comes out at the bottom of the tank in the form of apple juice. The water which was taken out by evaporation is put back in by this process and squeezed out again as apple juice. It is conceded that the product, by this process, is of the same quality as the juice extracted under pressure from the fresh apple. I need not stop to enter into an analysis given by the witnesses of this apple juice. It is sufficient to say that the apple juice taken from the dried apple is as good as the apple juice taken from the fresh apple, and that it contains no other properties than those found in the apple originally. The point of this case seems to turn on whether or not apple vinegar and apple cider vinegar indicate to the purchaser a particular process of manufacture. The old way of getting the juice from the apple and making cider or apple cider vinegar was simply to squeeze out the juice from the apple. There is nothing in any law which says what kind of apples these shall be. The people claim, as long as the substance be an apple, no matter what its condition, if it be subject to pressure and juice extraction, the product is that *only* which is known as apple cider or, after fermentation, apple cider vinegar.

The defendant's process, as given by the witnesses is as follows: The chops or apples are carried by automatic conveyors up to a platform; the platform is level with the top of certain receptacles, which are in the nature of tanks or vats, heavy planking being used for the sides of the vats and the bottom and heavy iron bands about it, unusually heavy. When the receptacle has been filled two-thirds or thereabouts full, a quantity of water

is added. Immediately after a grating of heavy pieces of wood is put on top of the apples on which a heavy weight is placed. The apples swell when they have reached a certain relation to the top of the tank and while that swelling is still going on a vent in the bottom of the tank is opened and a force of water is applied through a pipe which is inserted from above and when out of that vent in the bottom there has passed the same quantity of liquid that was in those apples in their fresh state, the force of the water at the top automatically shuts off; the vent at the bottom shuts off; and the juice from those apples has then entirely passed out, leaving nothing but water in the apples.

The method which the people insist upon is to grind the apples into fine particles, place the pulp in cloths, which in turn are placed upon an immovable flat surface underneath a movable surface driven by hydraulic power applied indirectly by means of a screw against the pulp in the cloth in such a manner as to squeeze out the apple juice therefrom. In the ordinary cider and vinegar factory this pomace from the first pressing is then picked apart or broken up and placed in a receptacle. To it then is added substantially one-half of its weight in water. The mass is then permitted to soak for from four to twelve hours, according to the weather, to diffuse the extract out. A second pressing is then taken. The resultant liquid from the first and second pressing being mixed and sold by such manufacturer as apple cider and the vinegar made therefrom as apple cider vinegar.

The juice obtained from the fresh and from the evaporated fruit is treated alike. The chemical transformation and the process and methods of manufacture into apple cider vinegar are identical. To this there is one exception. To prevent discoloration and arrest de-

composition the chopped apples in the process of evaporation are subject to a bath in sulphur fumes whereby the evaporated apple carries an entirely harmless quantity of sulphur dioxide beyond that contained naturally in the apple. To remove this additional sulphur dioxide content, the defendant utilizes barium carbonate before fining and filtration and thus eliminates the excess sulphur.

In view of the concession made by the counsel for the People that this sulphur and the chemical agent to remove it in no way adulterate the vinegar or change its substance or quality, and that there is in the vinegar product manufactured by the defendant no foreign substance, this element adds nothing to the People's case. As stated before it is simply one of branding, not of adulteration.

As said before we cannot read the statute of this state, which is above quoted, as giving the meaning to the words "cider vinegar," or "apple vinegar," and "pressed juice of apples," as indicating any particular kind of apples from which the juice is to be pressed. Provided the substance pressed be apples, the product apple juice, and the method of extraction pressure, the law is complied with. This product, when further treated, as required by law, becomes apple vinegar, or apple cider vinegar, and may be so termed. The law does not say or indicate how the pressure shall be applied. When a penalty is to be imposed or a manufacturer is subject to prosecution, it is reasonable to expect that the statute which he is claimed to have violated shall be clear, distinct, understandable and not subject to hidden meaning.

If the Legislature had intended in section 70 that the juice should be pressed from a particular kind of apple, or an apple in a particular condition, it would

have been a very simple matter to have said "fresh apples" or "not evaporated apples." The process of making vinegar from evaporated apples has been going on for a long time, and must have been known to the persons interested in drafting the Agricultural Law. When, therefore, the Legislature made no distinction in the kind of apples to be pressed, it is not for the courts to do it. Neither is it for the courts to try and figure out what the Legislature intended or might have intended or should have intended when the intention is not apparent upon the face of the statute. We find no intention to exclude evaporated apples from section 70.

That the Legislature had a broader purpose in mind is indicated when we read the entire section.

Section 70 is an attempt to define vinegar and adulterated vinegars. It says vinegars made by fermentation must be derived exclusively from the substance from which they were fermented. Cider Vinegar or apple vinegar is the product exclusively from the juice pressed out of apples, sugar vinegar is the product made from sugar, malt vinegar from barley malt, wine vinegar from the juice of grapes, glucose vinegar from corn sugar or glucose, distilled vinegar or grain vinegar from diluted, distilled alcohol. It is quite clear that the import of this statute is to require that when a thing is termed cider vinegar or apple vinegar that it shall be made exclusively from apples or from the juice pressed out of apples. The defendant's product meets this requirement; it is made exclusively from the juice pressed out of apples. The fact that the apples may have been dried apples or evaporated apples or green apples or old apples makes no difference so far as this law enacts.

This vinegar of the defendant and the label under which it was sold, it is conceded, complied with all the

other requirements of the law. As heretofore stated, the only complaint made is in the use of the label words "apple cider vinegar." The case of *People vs. Niagara Fruit Company* (75 App. Div. 11, 12; affm'd 123 N. Y. 629) is not in point as in that case coloring matter had been added to the vinegar making an illegal adulteration. It is said by Judge Spring in his opinion "the chemical analysis showed that each sample of vinegar was below the standard fixed by the Legislature of the State of New York, in that it contained less than the required quantity of acetic acid and that it was not the exclusive product of pure apple juice, and that it contained artificial coloring matter which caused a distinct change in appearance.

We are dealing with the interpretation of our statute in the light of the evidence before us, and for the reasons here stated the judgment of the Appellate Division and the Trial Term should be reversed and the complaint dismissed, with costs in all courts."

People vs. Douglas Packing Co., 236 N. Y. 1 (Advance Sheets June 16, 1923) 139 N. E. 759.

Should your Honors desire we shall be glad to furnish copies of the transcript of the record in the New York case.

The New York case is identical with the instant case. The evidence, while introduced in detail, conforms exactly to the agreed statement of facts in the present case. The label was the same. The New York laws regarding the labeling of vinegar are more drastic, if anything, than the Government standards, and the reasons advanced by the State in that case are the same

as the Government is urging in the case at bar. The decision holding that claimant's product was not misbranded is in entire accord with the opinion of the United States Circuit Court below.

The definitions of vinegar cited by the Government from the Statutes and regulations of the various states are not in conflict with the definitions under the Federal laws. The Government regulations and the various State statutes, permit the reduction of vinegar by the addition of water, and any claim, therefore, on the part of the Government, that the water added to the vinegar by claimant is a foreign substance, fails. Necessarily a State which has a regulation such as Massachusetts appears to have, limiting the juice to that from fresh apples, if permitting the reduction by the addition of water, is entirely without force, for the water may be added to the juice before fermenting, without affecting the fermentation, or the finished vinegar may in turn be diluted. So long as the proper acetic strength is shown on the label, there is no misbranding.

The case of *Commonwealth vs. Burtnett,* 58 P. Sup'r Crt. 604—cited by the Government at page 27, applied to vinegar made from unevaporated apples and held that the reduction of such vinegar by the addition of pure water constituted *adulteration.* The Pennsylvania law was subsequently amended—so the case is without point.

We are agreed with counsel for the Government that the primary object of the Pure Food and Drugs Act is to protect the public health and prevent deception. That this is the fact requires no comment, since the Courts, in interpreting the Act, uniformly declare this purpose.

In *United States of America vs. Antikamnia Chemical Co.*, 231 U. S. 654, it is stated that the purpose of the Act is

> "to secure a purity of food and drugs, and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it."

In *United States of America vs. Lexington Mill & Elevator Co.*, 232 U. S. 399:

> "The primary purpose of Congress in enacting the Food and Drugs Act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food."

To the same effect:—*United States vs. Coca Cola Co.*, 241 U. S. 265.

United States vs. Schider, 246 U. S. 519, 522.

> "We have heretofore said: 'The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.' *United States v. Antikamnia Co.*, 231 U. S. 654, 665. 'The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality.' *United States v. Lexington Mill & Elevator Co.*, 232 U. S. 399, 409. And see *United States v. Coca Cola Co.*, 241 U. S. 265, 277."

That the Courts, in construing brands or labels, give to words their ordinary and customary meaning, is not disputed, and again we agree with the Government.

U. S. vs. 150 Cases of Fruit Puddine, 211 Fed. 360;
U. S. vs. 75 Boxes of Alleged Pepper, 198 Fed. 934;
U. S. vs. 30 Cases Grenadine Sirup, 199 Fed. 932;
Von Bremen vs. U. S., 192 Fed. 904.

The Courts, in interpreting the Act, will keep constantly in mind the legislative intent, the evil sought to be overcome, and, if possible, give substantial force and effect to that intent.

As was said in *U. S. vs. 650 Cases of Tomato Catsup,* 166 Fed. 773, 775, which was a case involving an alleged misbranding of tomato catsup—

> "It is especially necessary in administering an act like the Pure Food Law, however beneficial it may be, that there should be reasonable definiteness and accuracy, not only in the statement of offenses against the act, but in conceptions of what is within the intent of Congress and what is not within that intent. In the administration of such an act it is particularly essential that it should not be given forced or strained constructions."

And the Courts will see that the officers of the Department in enforcing the Act, do likewise.

In re Wilson, syrup, 10 per cent. of which is made from maple sugar and 90 per cent. from white sugar, put up in bottles, having thereon labels, containing the name "Gold Leaf Syrup," with a trademark consisting of a gold leaf in the form of a maple leaf and stalks of sugar cane, and the words "Composed of Maple and White Sugar" in plain letters, was held not to be misbranded. In commenting on these facts, the Court said:

> "From examination of former cases dealing with the subject of misleading representations on labels, I am impressed with the great value of the

legislation known as the Pure Food Act * * * but I am further impressed with the fact that an attempt to apply that act to cases of this character cannot but serve to bring that act into such disfavor as to impair its usefulness. The distinction between the enforcement of law and the abuse of law is lost sight of in the attempt to make this obviously innocent act a criminal misdemeanor."

In re Wilson, 168 Fed. 566, 568.

"Save by the declaration in the statute as to what a label shall contain, no standards are prescribed for brands or labels or the minuteness or particularity in which they must indulge in describing an article of food. The statute should be liberally construed to effect its beneficent purposes, but no rule of construction permits us to so construe its language that the statute shall operate as a snare or trap to the honest manufacturer or producer who brands or labels his products, in descriptive words or devices which fairly inform the purchaser of the nature and ingredients of the product offered for sale and are not so framed as to deceive or mislead the ordinary purchaser."

United States vs. One Carload of Corno Horse & Mule Feed, 188 Fed. 453, 457.

The definitions, as we have before pointed out, are all alike. Various names are given to vinegars to distinguish the different kinds, one from the other. Vinegar from malted grain is "malt" vinegar; vinegar from alcohol and water, "spirit" vinegar; vinegar from fermented cane sugar solution is "sugar" vinegar, and vinegar made from apples, *derived by any* known process is "apple vinegar" "apple cider vinegar." Since such vinegar cannot be made from apples until the sugar content has been transformed into alcohol by fermentation, the intermediate product becoming hard cider and

the resulting product vinegar, this vinegar is and has always been called "apple cider vinegar" and the terms "apple vinegar" and "cider vinegar" are and always have been synonymous.

In view of the facts in this case, is the Department justified in the arbitrary position which it assumes in saying that *no* vinegar except that made from the juice of apples which have not been evaporated may be labeled "apple cider vinegar," or even "apple vinegar" as is sought to be done in this case, and as is shown by the last communication released by the Department of Agriculture relating to the labeling of vinegar made from apples which have been evaporated.

"U. S. DEPARTMENT OF AGRICULTURE
Office of the Secretary
Press Service.

Release—Immediate.

THE LABELING OF VINEGAR MADE FROM EVAPORATED APPLES.

Washington, D. C., February 20, 1922. On September 12, 1921, after consideration of conditions existing at that time the Department of Agriculture announced that no seizures would be made of shipments interstate of vinegar made from evaporated apple material if labeled 'Apple Vinegar,' pending a decision by the courts of cases already instituted on the shipment and sale of this product labeled as 'Apple Cider Vinegar.' Since that announcement the court has held that vinegar made from evaporated apple products is misbranded if labeled as 'Cider Vinegar' or 'Apple Cider Vinegar.' It is the opinion of the department, after carefu. consideration of the entire question, that the term 'Apple Vinegar' is very generally understood by the consuming public to

mean a product made by alcoholic and subsequent acetous fermentations of the juice of fresh apples, and is therefore regarded as synonymous with the term 'Cider Vinegar' and 'Apple Cider Vinegar.' A vinegar made from evaporated apples or evaporated apple products will therefore be considered misbranded if labeled as 'Apple Vinegar' without further qualification. Such a product if properly made is a pure and wholesome article of food, but it should be sold under a label clearly distinguishing it from the product made from the juice of fresh apples, such, for example, as 'EVAPORATED APPLE VINEGAR.' The decision temporarily permitting the use of the unqualified term 'Apple Vinegar' on a product made from evaporated apples or evaporated apple products, published September 12, 1921, is hereby revoked.

20-22-2 609-22."

Surely, claimant and other manufacturers who are honestly and in good faith producing a pure, wholesome product, which, under a fair, reasonable, everyday, common sense reading and interpretation of the definitions in the dictionaries and the standards prescribed by the Government, is properly labeled, are entitled to be and should be protected against the unwarranted ruling which the Government officials are now seeking to enforce.

We find no reported cases involving the question of the labeling of fruits that have been evaporated, or their juices, except those we have previously commented upon, yet evaporation, as applied to fruits, has been in common use since long prior to the time of the Food and Drugs Act.

The Government, in support of its claim that claimant's label is deceptive, quotes from a large number of cases having to do with misbranding. All these cases

deal with facts where adulteration and misbranding have been sustained because of the use of a substitute for some necessary ingredient, the addition of a coloring matter to produce an appearance similar to the genuine article, the misleading marking of an article blended or compounded from different articles, or involving the addition of a substance which will produce an effect or a taste similar to a recognized brand or compound; the use of unwholesome or impure ingredients, and the marking of an article falsely as to the state, territory or locality from which it is produced or in which it is grown.

In *Weeks vs. U. S.*, 245 U. S. 618, an article branded "special lemon, lemon turpine and citral," was held to be misbranded because it was offered for sale as lemon oil, when in fact it was made from alcohol and citral derived from lemon grass.

In *United States vs. Schider*, 246 U. S. 519, the article was labeled "Compound Ess Grape," but contained nothing from grapes.

United States vs. 10 Barrels of Vinegar, 186 Fed. 399, involved *a blend or mixture of distilled vinegar* to which a small quantity of pure *boiled apple cider vinegar* had been added for coloring, the product being described as "Saratoga Brand Vinegar, a blend of a pure boiled apple cider and distilled vinegar." It is well known that cider vinegar is superior to distilled vinegar, and the Court held the punctuation and general form of that label was misleading to the extent that the public did not understand that the vinegar was *a blended article*, and the forfeiture was sustained.

Libbey, McNeil & Libbey vs. United States, 210 Fed. 148, had to do with the labeling of condensed milk, con-

taining 42 per cent. of cane sugar, and since condensed milk, as known to the trade, did not contemplate sugar, it was condemned as misbranded.

United States vs. 150 Cases of Fruit Puddine, 211 Fed. 360. The product known as "fruit puddine" and labeled "Fruit Flavored Puddine" was misbranded because no fruit was used in the product.

United States vs. 2 Cases of Chloro-Naptholeum Disinfectant, 217 Fed. 477. A disinfectant labeled "Chloro-Naptholeum" not containing an essential ingredient either chlorine or chloro-napthol, was therefore held misbranded.

In *Prince Mfg. Co. vs. Princess Metallic Paint Co.*, 135 N. Y. 24, the paint involved did not contain ore mined from the tract belonging to Prince, and the use of that trademark was therefore enjoined.

In *Warden vs. California Fig Syrup Co.*, 187 U. S. 516, the use of a label "Fig Syrup" or "Syrup of Figs" was a misbranding because the product contained practically no syrup or extract of figs in compound and its medicinal quality was due to the senna which it contained.

Royal Baking Powder Co. vs. Emerson, 270 Fed. 429, was a case where baking powder, manufactured under a certain formula, had been marketed for a number of years and the formula was advertised as having particular merit. Later the manufacturer substituted phosphate for cream of tarter or tartaric acid. The public, through this manufacturer's campaign of advertising, had, *prior to the substitution*, been particularly educated to the fact that the substituted ingredients were not healthful or as good as the original ingredients, and, therefore, when the changed article was sought to

be sold under a label which led the purchaser to believe that he was buying the former article, there was a misbranding.

An analogy is sought in the case of oleomargarine, but as the ingredients in oleomargarine differ from those in butter, the case is not parallel.

None of these situations are analogous to the instant case, and the language of the Court, in condemning the labels and products therein involved, would not apply to claimant's product.

The instant case stands upon its own facts, and involves neither substitution, imitation, inferior products, or any of the other grounds considered in the cited cases. The Government's principal argument for misbranding is that the consumer is deceived, that claimant's label "exhales deceit," not because an inferior product is marketed, not because the product is different in any single respect that the Government is able to point out, not because the product is not apple cider vinegar, but because it is manufactured in a manner different than the Government claims it is popularly supposed to be produced. That such a conclusion is unjustified is apparent from the facts and was one of the grounds for reversing the District Court.

> "The missing and essential element for the Government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. The danger of reliance on judicial knowledge founded on past impressions is well illustrated by the salad oil cases. The very branding which the court, in *Brina v. U. S.*, 179 Fed. 373, said it judicially knew was so untrue as to compel the conclusion of misbranding, two years later, was shown

to the same court in *Von Bremen v. U. S.*, 192 Fed. 904, to be so true as to require an instructed verdict for the respondent. In the present case it is conceded that this identical product has been sold and accepted by the trade under this name in great quantities for many years and without challenge until now. While there is nothing in the agreed statement of facts to show how far this acceptance has been with knowledge, yet the court can not judicially know that this acceptance was so wholly without knowledge of the facts as to be unimportant." Rec. pp. 33-34.

The Government intimates that unless its distinction in the labeling of vinegars is enforced, unfair competition among the producers of different types of vinegar is promoted. The question intimated is entirely outside the purpose and scope of the Pure Food and Drugs Act and is not in any way an issue in this case, but granting for argument that it is an issue and that there is cause to consider it, the facts are contrary to such a conclusion.

The process of manufacturing vinegar from the juice of apples that have been evaporated is not a new process, but is one that has been in general use among manufacturers since prior to the Pure Food and Drugs Act, and vinegar so produced has for years been sold under the label "Cider Vinegar." Apples to be evaporated must be apples that are sound and free from rot and the vinegar manufactured from such apples must, therefore, be of a better grade than vinegar manufactured from the ordinary run of cider apples. The further fact that the preserving of apples for vinegar purposes by evaporation will help to conserve the apple crop and so tend to prevent a cornering of the vinegar market, through securing control of the fresh apple

crop, indicates that rather than promoting unfair competition among the vinegar manufacturers it operates as a preventive and assures the public of a uniform vinegar manufactured throughout the year. An appalling waste in the apple crop is avoided and an industry which would be confined to manufacture during a short period of time is permitted to employ its labor and capital over the entire period of the year.

Considering the facts in this case impartially, can it be fairly claimed that claimant's vinegar is anything else than apple cider vinegar? Evaporation, according to any known scientific test, removes no constituent part of the apple other than water. Yet the Government insists there may possibly be a difference in the vinegars and demands a label that indicates a difference.

What possible benefit can result to anyone from a label that suggests a fancied difference where none in fact exists? Why discriminate against vinegars? An apple pie is an apple pie whether made from apples which have been evaporated or apples which have not. The same is true of peach or apricot pie. Maple syrup, whether made from maple sap or maple concrete, is maple syrup. Cider reduced by freezing or by boiling, and to which the water frozen out or boiled out is later restored, is still cider.

Cider is frozen or boiled to eliminate part of the water in order to reduce its bulk and thus facilitate preserving and storing, and maple sap is converted to maple concrete for the same purpose. So in the case of claimant's vinegar, the water is partially removed from the apple to prevent the waste and deterioration incident to handling and storing of raw apples or the juice thereof. Is this apple juice, remaining after reduction

by eliminating part of the water, to be condemned because stored and preserved in the cellular tissue and portion of the apple itself rather than in some other appropriate container?

> "The conservation of our food product is of some concern to the public and perhaps second in importance only to the demand for pure and unadulterated food. * * * Therefore, an efficient and harmless method of preserving the fruit until it can be used for this purpose is in the direct interest of the public, and if this method has accomplished that object without changing the product it should be encouraged rather than condemned." Record, p. 32, Opinion C. C. A.

The Food and Drugs Act deals with substantial and not fanciful things. Neither the letter nor the intent of the law as to misbranding justifies a distinction between vinegar made from apples by a continuous process and vinegar made by the same process slightly interrupted, when the product is the same. When a purchaser is securing an article branded for what it is, there is no deception. Claimant's product is not an imitation, and is not offered for sale under the distinctive name of another article. The label is not misleading, and contains no statement regarding the ingredients which is misleading in any particular, inasmuch as the vinegar is genuine apple cider vinegar, and the apples from which it is made are selected in the first instance for their freedom from rot and ferment, and for their soundness and maturity. The labeling which the Department is insisting on in this case is arbitrary and unwarranted and of no benefit to the public.

> "It must also be assumed that legislation upon any subject has some definite and substantial object in view and is not in furtherance of technical

purposes or barren idealities. It was declared by the Supreme Court of the *United States against Lexington Mill and Elevator Company,* 232 U. S. 399, that the primary purpose of Congress in enacting the Food and Drug Act of 1906 was to prevent injury to the public health in the sale and transportation of interstate commerce of misbranded and adulterated food. That case involved the manufacture of flour by a new process called 'Alsop Process,' and while the charge there was adulteration by adding to articles of food consumption poisonous and deleterious substances, a much more serious matter than misbranding, yet the court held that in order to condemn a food product upon the ground that it is adulterated, it is encumbent upon the Government to establish the fact that the added substances may render the article injurious to health. This conclusion was reached evidently upon the theory that the legislative intent was to accomplish a substantial and beneficial result to the public *and not merely for the purpose of exercising arbitrary control of a private business.''* R. pp. 32-33, Opinion C. C. A.

The judgment of the Circuit Court of Appeals should, therefore, be affirmed.

Respectfully submitted,

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No. 559

In the Supreme Court of the United States

October Term, 1923.

UNITED STATES OF AMERICA, PETITIONER,

v.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE GOVERNMENT'S APPEAL.

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In the Supreme Court of the United States

October Term 1923

No. 559

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

NINETY-FIVE BARRELS, MORE OR LESS,
ALLEGED APPLE CIDER VINEGAR,
DOUGLAS PACKING COMPANY,
Claimant.

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE GOVERNMENT'S APPEAL.

By permission of this court and with due acknowledgement of the courtesy, this brief is filed in support of this appeal, on behalf of

1. The American Cider and Vinegar Manufacturers Association, a national trade organization whose members are engaged in the production of genuine cider and genuine cider vinegar from the pure native juice of fresh, whole apples. Its membership includes many of the largest manufacturers of such products in the coun-

try, and its executive office is purposely located at Rochester, New York, in the heart of one of the great apple producing districts of the country.

2. The National Grange, a national organization of farmers representing growers of apples, which presents the following resolution:

> Whereas, the farmer producers of food products in the United States are continually finding themselves injured by the competition of artificial and imitation products, and
>
> Whereas, the farmers were among the first advocates of the Pure Food Law and are now its strongest supporters, and
>
> Whereas, we believe that the intent of the Pure Food Law to protect both producers and consumers from frauds and imitations, is being violated by misleading labels which technical interpretation of its provisions permits being used, and
>
> Whereas, a striking illustration of this is found in a recent decision in a Federal Circuit Court, which permits manufacturers of a kind of vinegar made from dried apples to be labeled with the words "Pure Cider Vinegar," which decision is very detrimental to the manufacture of real cider vinegar and the business of apple growers and producers in furnishing apples for its manufacture, and
>
> Whereas, this decision is also opposed to the views of the officials of the Bureau of Chemistry, United States Department of Agriculture, who have charge of enforcing the Pure Food Law, and is now being contested in the United States Supreme Court by the Attorney-General and the Solicitor of the U. S. Department of Agriculture, now therefore,

> Be it Resolved, that we go on record as favoring the prosecution of this appeal to the end that the words "Pure Cider Vinegar" be limited in their use to vinegar made from the expressed native juice of whole fresh apples, and that we hereby authorize William W. Armstrong of Rochester, N. Y., to present this statement of our views and urge the Supreme Court to give proper consideration to the same.

3. The American Farm Bureau Federation, another national organization of farmers, representing growers of apples.

4. The H. J. Heinz Company of Pittsburgh, Pa., one of the largest producers of genuine cider vinegar in the country.

5. The National Fruit Product Company of Washington, D. C., and I. S. Dawes & Son of Imlaystown, N. J., large manufacturers of both genuine cider vinegar and vinegar made from dried apples who distinguish these products by appropriate labels, samples of which will be submitted with this brief, and who market their vinegar made from dried apples *without attempting to remove the sulphur dioxide.*

These producers of apples and manufacturers of genuine cider and genuine cider vinegar join in this appeal for the reason that the continuance of the large industries in which they are engaged, has been imperiled by the decision of the court below without opportunity to be heard although the interests represented by them and thus affected by the decision, are many times greater than that of claimant.

STATEMENT.

The packages in question were labeled, so far as pertinent here

"Apple Cider Vinegar"
"Made from Selected Apples"
"Guaranteed to Comply with all Pure Food Laws"

The article in the packages was a vinegar made from a liquid obtained by adding water to dried apples. The District Court eliminated the two charges of adulteration, one by finding the charge unsupported and the other by making no finding thereon.

The question before the court was, in the language of the statute, (1) whether the package or label bore any statement regarding such article or the ingredients or substances contained therein which were false or misleading in any particular, (2) whether the article was an imitation of or offered for sale under the distinctive name of another article, or (3) whether it was labeled so as to deceive or mislead the purchaser.

The question, as stated by the court below, in its opinion, was, "whether the product is the identical thing that its brand indicates" (Opinion p. 31).

Claimant demurred, before answer, in the District Court, and, apparently by reason of the court's suggestion in overruling the demurrer (R. p. 10), the cause was submitted to the District Court upon an agreed statement of facts without taking testimony. The District Court rendered judgment for the Government condemning the vinegar as misbranded; that judgment was re-

versed by the Circuit Court of Appeals in the Sixth Circuit whereupon the Government brought the case to this court upon writ of certiorari.

A majority of the court below was of opinion that the judgment of the District Court was not sustained by the agreed statement of facts because this product was made from the juice of apples and was substantially identical with apple cider vinegar made from fresh apples. It does not appear who of the judges dissented.

ARGUMENT.

We shall discuss these questions under the following subdivisions:

I. The purpose of the Food and Drugs Act.
II. The Act should be liberally construed to give effect to that purpose.
III. What meaning should be given to the language of the Act.
IV. Of what judicial notice should be taken.
V. The application of these principles to the case at bar.
    1. The meaning of the words "cider vinegar."
    2. Cider vinegar is a distinctive name.
    3. Why claimant removes the sulphur dioxide with barium carbonate although other manufacturers of such vinegar do not.
    4. The analogies referred to in the court below.
    5. The suggestion that a truthful label would be prejudicial to claimant.
    6. The argument of the court below that no substantial or harmful deception is practiced on the consumer.

should be construed to give substantial effect to the intention to protect the consumer and meet the evils intended to be embraced within its provisions.

Libby, McNeil & Libby vs. U. S., 210 Fed. 148.

> Every consumer has the right to distinguish for himself what an article of food is and have the means of judging for himself, uninfluenced by deception, its quality and value.
>
> *People vs. Henning Co.*, 260 Ill., 554, 103 N. E., 530, 9 L. R. A. N. S. 1206.

In the above case in Illinois, the court condemned a vinegar *although apparently correctly labelled,* for the particular reason that it was an imitation of cider vinegar which *might* deceive and mislead the public.

> The purpose of the Act is to secure the purity of foods and drugs and *to inform purchasers of what they are buying.* Its provisions are directed to that purpose and must be construed to effect it
>
> *U. S. vs. Anti Kamnia Chemical Co.*, 231 U. S. 654, 665.
>
> *U. S. vs. Schider,* 246 U. S. 519, 522.

> The legislation as against misbranding intended to make it possible that the consumer should know that an article purchased was what it purported to be.
>
> *U. S. vs. Lexington Mill Co.*, 232 U. S. 399, 409-410.

The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food.

Plumley vs. Mass., 155 U S., 462, 468.

The deception against which such statutes are aimed is an offense against society.

Plumley vs. Mass., 155 U. S. 462, 469.

It is in the light of the purpose and of the power exercised by its passage by Congress that this act must be considered and construed.

MacDermott vs. Wisconsin, 228 U. S. 114, 128.

The statute is so particular in this respect that it is not limited to actually misbranded goods but extends to those offered for sale in imitation of or under the distinctive name of another article, although the package itself may be correctly branded.

Weeks vs. U. S. 245 U. S. 618.

II.

The Act Should Be Liberally Construed to Give Effect to That Purpose.

Food acts must be liberally construed so as to give substantial effect wherever possible to the legislative intent to protect the consumer and to meet the evils intended to be embraced within their provisions.

Galt vs. U. S. 39 App. Cas. (D. C.), 470.

Dade vs. U. S. 40 App. Cas. (D. C.), 94.

The rule of strict construction is not violated by giving the words in this statute a reasonable meaning according to the sense in which they were used.

Commonwealth vs. Burtnett, 58 Pa. Sup'r. Ct., 604.

"The rule of strict construction has little or no application to food statutes."

Andersen vs. U. S., 284 Fed., 542.

"If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or we may add, by the personal opinion of judges 'upon the issue which the legislature has decided.'"

Hebe Co. vs. Shaw, 248 U. S. 297, 303.

III.

What Meaning Should Be Given to the Language of the Act.

The language of the statute must be construed in accordance with the understanding of the common man from whose vocabulary it was taken.

U. S. vs. Bhagat Singh Thind, 261 U. S. 204.

The words of a statute are to be taken in the sense in which they will be understood by the public, in which they are to take effect. Science and skill are not required in their interpretation except where scientific or technical terms are used.

U. S. vs. Isham, 17 Wall., 496, 504.

U. S. vs. 75 Boxes of alleged pepper, 198 Fed. 934, 935.

Libby, McNeil & Libby vs. U. S., 210 Fed. 148.

The inquiry in such cases is whether the ultimate purchaser will be misled.

Libby, McNeil & Libby vs. U. S. 210 Fed. 148, 150.

Royal Baking Powder vs. Emerson, 270 Fed. 429, 435.

Royal Baking Powder vs. Donohue, 265 Fed. 406, 408.

Courts will take cognizance of the well known fact that farmers, laboring men and consumers are not generally familiar with the customs of trade and commerce in importing goods or of the understanding of the trade between manufacturers and merchants who buy these food products for retail trade. Such construction would emasculate the pure food laws and deprive the people of the protection which the legislature wisely intended to give them.

Libby, McNeil & Libby vs. U. S., 210 Fed. 148, 150, citing

Armour & Co. vs. Dairy & Food Commission, 159 Mich. 10.

The argument for claimant is that because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believes that fig juice or syrup has laxative medicinal properties. It is to them that claimant seeks to sell its preparations and it is with respect to their knowledge and impression that the

character, whether descriptive or fanciful, of the term used is to be determined.

Worden vs. Cal. Fig Syrup Co., 187 U. S. 516, 536, citing

Cal. Fig Syrup Co. vs. Stearns, 73 Fed. 812 (Taft Cir. J.)

In support of the reversal of the District Court's judgment, the case of Von Bremen vs. U. S., 192 Fed. 904, is cited by the court below. The reasoning of that case, however, is not applicable to the instant case. Claimant's real contention here is not that the words "apple cider vinegar" have acquired a secondary meaning in the mind of the purchasing public as did the words "salad oil" in the Von Bremen case; but that the words here involved in their primary and popular signification, are truly descriptive of its vinegar.

The opinion in the court below appears to hold that the practice of certain vinegar manufacturers (without disclosure to the ultimate purchasing public) of labeling dried apple vinegar as "apple cider vinegar" would suffice to bring about a modification of the meaning of that term. Such a practice, however, on the part of food manufacturers would not be sufficient to validate a falsely descriptive term and render it true.

Worden v. California Fig Syrup Co., 187 U. S. 516, 528.

Pillsbury v. Pillsbury-Washburn Flour Mills, 64 Fed. 841.

Federal Trade Comm. vs. Winsted Hosiery Co., 258 U. S. 483, 492.

See also the statement from the opinion of this court in the case of Maddock v. Magone, 152 U. S. 368, as to the elements necessary to establish a commercial designation for a term, where at page 371 the following occurs:

> "Necessarily the commercial designation is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal."

IV.

Of What Judicial Notice Should Be Taken.

The District Court committed no error in taking judicial notice of the meaning of such common words as cider, cider vinegar and apples, especially in view of the concession in the agreed statement (R. p. 12) that vinegar made from the juice of fresh apples is entitled to the name "apple cider vinegar".

> "Courts will take notice of the meaning of words in the English language and of such matters of common knowledge and science as are or may be well known to all men of ordinary understanding and intelligence."
>
> *Brown v. Piper*, 91 U. S., 37, 42.
>
> *King vs. Gallun*, 109 U. S., 99, 102.
>
> *Eureka Vinegar Co. vs. Gazette Printing Co.*, 35 Fed., 570, 571.

> "The court is bound to take judicial notice of the ordinary meaning of all words in our own

tongue. Dictionaries are admitted not as evidence but as aids to the memory and understanding of the court."

Nix vs. Hedden, 149 U. S., 304.

So the federal courts have repeatedly taken judicial notice of the meaning of the word cider.

Monroe Cider, Vinegar & Fruit Co. vs. Riordan, 280 Fed., 624.

Sterling Cider Co. vs. Casey, 285 Fed. 885, affirmed by the First Circuit Dec. 21, 1923.

Hildick vs. Williams, 269 Fed., 184.

Duffy-Mott Co. vs. Blair, 292 Fed. 986.

In the Monroe Cider, Vinegar & Fruit Company case (supra), the court said:

"It (cider) has a familiar place in literature; for Bacon refers to 'a kind of cider made of a fruit of that country,' and in Audley Court, Tennyson speaks of 'a flask of cider from his father's vats.' An English revenue or excise statute of 1763 was known as the cider act.

Sweet and hard cider have been designations of the fermented and unfermented expressed juice of apples in common use in the English language long before any man now living was born.

Doubtless in every state of the Union, and almost in every corner of every state, sweet cider is produced for home consumption or commercial distribution, and whether in the Genesee Valley or the Shenandoah Valley there is hardly a farm, large or small, where, typical of the farms throughout the country, there is not some production of sweet cider."

There is no authoritative definition of apple cider which embraces the artificially produced solution obtained from dried apples and water. Whenever the term "cider" has been judicially noticed it has been applied exclusively to the expressed native juice of fresh apples, thus in Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570, 571, it was held that:

> The meaning of the word "cider," its method of production, and its general constituents, are matters of common knowledge, and upon which all books of accepted authority agree. *No court would be justified in affecting ignorance of these facts, or in closing its eyes to them, in cases requiring their application.* In a popular sense, the term "cider" includes the expressed juice of apples, either fermented or unfermented, and hence the terms "sweet cider" and "hard cider" are in popular use to distinguish between the juice of the apple before and after fermentation.

See also *State vs. Frederickson*, 101 Me. 37.
State vs. Spaulding, 61 Vt. 505.
State vs. Crawley, 75 Miss. 919.
State vs. Oliver, 26 W. Va. 422.
11 *Corp. Juris* 764.

The foregoing excerpts from adjudicated cases leave no doubt that the product popularly known as apple cider consists exclusively of the native juice expressed from fresh apples, and that such fact is properly the subject of judicial notice. Current standard lexicographies which reflect current usage continue to define the word "cider" without modification of its original meaning.

The court below indicated that its decision was based upon lack of judicial knowledge that the word "cider" in the English language imported the expressed juice of fresh apples by twice declaring that to be one of its reasons as follows:

> "The missing and essential element for the government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below and the judgment based thereon" (Opinion p. 33).
>
> "The opinion (in the District Court) seems to be based in part upon inferences and testimony not presented by this record and in part upon judicial knowledge that nothing is apple cider unless it is pressed from fresh apples—an inference wholly inconsistent with the facts here conceded." (Opinion p. 36).

The basis of the reversal of the District Court's judgment appears to be that the definition of apple cider vinegar judicially noticed and applied by the court below, included a process of production which was no essential part of the definition. This conclusion is untenable where the label on claimant's product implied a particular process or method of production from a source and material which left the ultimate purchaser under the *unescapable* impression that the product was other than what it was, namely, apple cider vinegar produced in the well known way from the expressed juice of fresh apples.

V.

The Application of These Principles to the Case at Bar.

1. The meaning of the words "cider vinegar."

Vinegar is a generic term and comprises many different kinds as cider vinegar, distilled vinegar, sugar vinegar, wine vinegar etc. The words "apple cider vinegar" necessarily import that it is made not only from apples but from cider. In addition to this the agreed statement (R. p. 12) concedes that vinegar made from the juice of unevaporated apples is entitled to the name "apple cider vinegar".

"Apples" in the ordinary, popular understanding have never included other than fresh apples. Any other kind of apples has required an adjective of distinction, such as dried evaporated, canned, etc. A contract for the purchase of apples could not be fulfilled by the tender of dried apples or rotten apples or other than by the tender of merchantable, fresh apples.

And the word "cider" for many centuries in the English language, and for many centuries before that in the languages from which English was derived, has meant both in the ordinary popular understanding, and according to lexicographers and etymologically, the native juice of fresh apples or fresh fruit. Lexicographers unite in declaring juice to mean "the expressible or extractive fluid of the plant or fruit."

"Cider vinegar" obviously means vinegar made from cider. The addition of the word "apple" adds nothing to the meaning, for there is no other kind of cider than

apple cider. Now while apple vinegar may not always import a vinegar made from cider, cider vinegar not only imports a vinegar made from apples but a vinegar made also from cider, and that in turn necessarily imports the native juice of fresh apples.

Labels are to inform the public. They are for their benefit, and the law must be construed so as to enable the public to determine from the labels what it prefers without deception *in any particular.*

And so it comes about that many technical terms which otherwise would be unobjectionable are positively objectionable under this statute because they are not understood by the public, they being the persons for whose protection the statute was passed and for whose protection its language must be enforced. The reason for this is very plain. The consumer may not understand scientific terminology, but he is familiar with the ordinary meaning of words, and he will not be deceived or misled by their use, although their popular meaning may not be scientifically accurate; for example, soda water is a familiar trade description of an article which now as is well known, rarely contains soda in any form. Such a name is not to be deemed either misleading or false as it is in fact distinctive.

U. S. vs. 40 Barrels, 241 U. S. 265, 287.

2. Cider vinegar is a distinctive name.

In this country the word vinegar standing alone, which originally meant sour wine, has been used for generations to designate a product made from apples and has not been used to designate vinegar made from any other source without an adjective to indicate the distinc-

tion, such as distilled vinegar, sugar vinegar, wine vinegar, etc., and similarly cider vinegar has been used to designate an article made exclusively from cider, which in turn has never been understood to mean anything else than the native juice of fresh apples, so that when any other kind of vinegar is offered for sale under the name of cider vinegar it is an imitation or offered for sale under the distinctive name of another article, in violation of the terms of the statute, and also in violation of the statute which provides that the label shall bear no statement which shall be false or misleading in any particular. It would be difficult to find language more precise or comprehensive.

In discussing what a distinctive name may be this court has said:

> "A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public it matters not that the name had originally a different significance. * * * Such a name is not to be deemed either misleading or false, as it is in fact distinctive. But unless the name is truly distinctive the immunity cannot be enjoyed; it does not extend to a case where an article is offered for sale 'under the distinctive name of another article'; thus that which is not coffee or is an imitation of coffee cannot be sold as coffee and it would not be protected by being called 'X's Coffee.' "
>
> *U. S. vs. 40 Barrels*, 241 U. S., 265, 287.

Cider vinegar is thus a name "by which a product of a given kind is distinctively known to the public."

Let it be plainly understood that we have no quarrel with this product when sold under its own label for what it is. Our only quarrel with it is when it is sold under a label for what it is not, nor are we concerned with how closely it approximates the article which it imitates; the greater the similarity the greater the opportunity for deception; the closer the similarity between the genuine and the imitation product the greater the vigilance of the court should be to enable an informed public to intelligently discriminate as to which it prefers. If we could make a counterfeit ten dollar bill so nearly like a genuine one that the difference could not be detected by treasury experts, we would be the most dangerous counterfeiters in the country; the fact that it is not the other article under whose label it is sold at once disposes of all argument that it is entitled to be called that article. In the language of the Act it is an imitation or offered for sale under the distinctive name of another article and so is misbranded.

The suffix "ade" in our language means water flavored either with an extract or the juice of fruits, such as, "lemonade", "orangeade", etc., and in this sense the word "appleade" more nearly describes the solution claimant obtains from dried apples than the term "cider" which it uses. If it would use some such terminology for its product it would not be necessary to distort the popular and quite precise meaning of the terms cider and apple juice.

3. Why claimant removes the sulphur dioxide with Barium Carbonate although other manufacturers of such vinegar do not.

The quantity of sulphur dioxide, as stated, in dried apples, is "small and entirely harmless." (R. p. 11). If claimant chose to leave this small and entirely harmless quantity of sulphur dioxide in the liquid it would in no manner impair its quality any more than the sulphur dioxide in ordinary commercial dried apples impairs the quality of pies or sauces made therefrom, but if claimant left this sulphur dioxide in the liquid its presence in the finished product would unmistakably characterize the nature of that product, and the removal of this sulphur dioxide by the use of the barium carbonate is for the sole purpose of removing therefrom *the only definite earmark of its character* and *to imitate* the more expensive and genuine article, cider vinegar.

Other manufacturers of vinegar from dried apples, among whom are National Fruit Product Company and I. S. Dawes and Son whom we represent, have not so removed this sulphur dioxide and have sold the product as vinegar made from evaporated apples, obtaining, it is true, a less price therefor, but honestly branding it for what it was (See their labels).

Barium carbonate which claimant uses to precipitate the sulphur (R. p. 11) is a virulent poison. When the quantity of barium carbonate used for this purpose is just sufficient for the purpose only a trace of barium remains in the finished vinegar. *But suppose some careless employee used too much:* then the finished vinegar would be poisonous. And the Act forbids the interstate shipment of articles of food if they "contain any added poisonous or other added deleterious ingredient which *may* render such articles injurious to health."

4. The analogies referred to in the court below.

The first of these was cream obtained by the use of a separator.

It is of course immaterial whether an article sold as cream was cream which rose to the top of the milk or was obtained by a centrifugal separator. The cream thus produced was the native butter fat contained in the milk. Similarly it would not matter whether the cider from which the vinegar was made was derived by the ordinary means of pressure or by a centrifugal separator if that method could be applied to it. The native juice thus obtained from the apple by either method would be cider, and the term cider has never included anything else than the native juice of the apple.

If the same quantity of water which had been evaporated from evaporated milk were restored, would the product thus produced be entitled to be labeled and sold as milk, which has always meant the natural, lacteal fluid and nothing else, even if the constituents thereof were chemically or by every other ascertainable method, identical?

This very principle has been applied to milk from which a portion of the cream had been removed, although what remained *contained the required percentages of fats and solids.*

People vs. Koster, 121 N. Y. App. Div., 852.

The same principle has been applied to oleomargarine when sold as butter, although the court assumed that oleomargarine *was composed of the same elements and was substantially the same article as butter* except as regards its origin.

The court said:

> "If it possesses the merits which are claimed for it and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects, but they may legally be required to sell it for and as what it actually is and upon its own merits and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter but it is not butter made from cream and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other."

People vs. Arensberg, 105 N. Y., 123, 129.

And it cannot be doubted that the court would apply the same reasoning to butter made from evaporated whole milk, or evaporated cream. Indeed, the principle has already been applied to a product made from powdered milk.

Commonwealth vs. Boston White Cross Mill Co., 209 Mass., 30.

And to the sale of malted milk when the proofs showed it was made from powdered, skimmed milk.

People vs. Kuperschmid, 107 Misc. (N. Y.), 506.

Milk constituents are normal ingredients of butter, but butter to which milk had been added so that it contained at least six per cent more water than normal butter has also been condemned.

Pearks vs. Knight, 70 L. J. K. B. N. S. 1002, 85 L. T. N. S. 379, L. R. A., 1915B, 776, note.

It may be suggested that the principle of the oleomargarine case is not applicable because oleomargarine contains ingredients not derived from milk or cream, but claimant's product contains ingredients not derived from the apple, and more important still, claimant is obliged to resort to artificial means (removal of the sulphur dioxide used in drying), as was the oleomargarine maker, to make it resemble cider vinegar, a more expensive article, in order to obtain the higher market price of cider vinegar, as plainly appears from the agreed statement of facts.

The other analogy of the court below relative to the manufacture of maple sirup from maple concrete dissolved in water is less apt, as the court recognized, and the ruling itself is fundamentally erroneous. The fact is that sirup is an equivocal term and merely indicates a concentrated product. The analogy fails because the terms "juice" and "sirup" are not comparable terms. The word "sirup" is a generic term for any concentrated or viscous liquid made from the crystals of cane or beet sugar or other sources. In its application to maple sirup it means the sap of the maple tree condensed by boiling to the requisite consistency or (as permitted by the ruling) by adding water to the maple concrete, but the term "syrup" is not interchangeable with the terms "sap" or "juice".

This distinction is plainly pointed out in a decision by Mr. Justice Taft when a judge in the Sixth Circuit in the case of Smith v. Rheinstrom, 65 Fed. 984, 986, elsewhere referred to in this brief.

A truer analogy would exist in the products of the maple and the apple tree by using the terms "sap" and "juice" as substantially equivalent terms.

Manufacturers and dealers in maple sirup have been obliged to meet this ruling by distinguishing between genuine maple sirup produced by boiling maple sap and that produced by disolving maple concrete in water by branding the former "maple sap sirup" and thus enabling an informed public to discriminate between the two products.

5. The suggestion that a truthful label would be prejudicial to claimant.

The argument is that a label which disclosed the source of the vinegar in question would be prejudicial because the consumer might be prejudiced if he knew its origin and that the consumer must be kept in ignorance of this so that he may not have an opportunity to exercise his intelligence. Where can support be found for such a proposition in this statute whose express purpose is to prevent the consumer from being misled or deceived *in ony particular?* Because the reduction of vinegar with water is permitted when indicated upon the label it is argued that the use of water in the manufacture of the vinegar is not open to criticism, but the government ruling permitting the reduction of vinegar with water presupposes that cider vinegar shall first have been produced before the reduction is attempted, and unless the substance reduced be first genuine cider vinegar it is a violation of the statute.

The statement in the opinion of the court below (R. p. 34) that "a large part of the purchasing public * * * might have a distinct prejudice against such a method of manufacture" as that employed by claimant finds support in the motion filed by claimant in the court below to advance the cause (R. p. 27) where claimant urged as

its reason therefor that until the controversy resultant from the decision in the District Court was settled, claimant was "very seriously handicapped in the manufacture and distribution of its product". It is precisely that handicap that claimant seeks to avoid in this litigation by marketing its product under the long used and well understood label of cider vinegar instead of revealing the truth to the consumer.

The statement in the court below that it would be an undue hardship to compel claimant to label its vinegar so as to disclose its derivation from dried apples and added water is also pertinently answered by the following observations of Judge Rose in the case of U. S. v. Two Cases of Chloro Naptholeum Disinfectant, 217 Fed. 477, at page 484 of the opinion.

> Claimant pointed out that for many years it had sold large quantities of its product under this particular name. It had done no harm to anybody. It asked why it should be compelled to incur all the trouble and expense of familiarizing the purchasing public with a new name for the old thing. There is no doubt that to do so would be both costly and inconvenient. Nevertheless, it must be borne in mind that in the long run the honest manufacturer, as claimant doubtless is, is the one principally interested in the strict, and in even the rigid enforcement of laws of this character. The more candid all his competitors are required to be, the better for him. Standards impossible of unvarying application will work to his injury. He cannot afford to say anything about his goods which is not true in every reasonable sense, and from the standpoint of every well-informed person, true. If he is a law-abiding man, he does not want to take the chance of doing something which may be held to be illegal.

In Royal Baking Powder Company v. Emerson, 270 Fed. 429, it was held:

> If the manufacturer of a product or article of established reputation makes a change in the article, and that change be of a character which would, considering all the attendant circumstances, naturally affect the attitude of the purchaser of that article, fair dealing and the law requires that such purchasers be effectively informed of that change.

In the case just cited, an analogous situation is presented to that of the instant case. Baking powder is merely a combination of some inert material acting as a vehicle with a leavening agent. Ordinarily, the leavening agent is either phosphate or cream of tartar. The misbranding in that case was predicated upon the substitution of phosphate for cream of tartar in the product without informing the public of such substitution by an appropriate change in the labeling of the product.

It is a vital principle of labeling statutes derived from equity that *purchasers may not be led by deception into buying an article they do not want*, even where such buying would result in their advantage.

> *Pillsbury vs. Pillsbury-Washburn Flour Mills*, 64 Fed. 841.

As Judge Westenhaver said, "the mere fact that 'apple cider' and 'selected apples' are brought together in this label conveys unmistakably the impression" (that the vinegar is made from the native juice of fresh apples).

And the phrase on the label, "Guaranteed to Comply with all Pure Food Laws" adds emphasis to the misrepresentation contained in the label. As was said in *U. S. v. 10 Barrels of Vinegar*, 186 Fed., 399, 401, in referring to any latent suspicion which might be aroused in a purchaser by such a label:

> "He, (the purchaser) is comforted with the assurance 'We guarantee the vinegar sold under our brand to comply with the requirements of the national and state pure food laws.'"

With due deference to the opinion of the Court below, there is no justification for the assumption in its opinion that the words "apple cider", in common English speech and usage, means any other product than the native juice of fresh apples. Even if the extreme concession be made that claimant is correct in the debatable assumption, that the residual moisture remaining in the dried chopped apples from which this vinegar was made, is in such form as to be correctly termed "juice" or "concentrated juice", it does not follow that when such a semi-solid substance is diluted by the addition of water it is thereby reconverted into apple juice unless the term "juice" which denotes exclusively the natural fluid content of fruits, be distorted from its normal meaning.

Chief Justice Taft in the case of Smith v. Rheinstrom, 65 Fed. 984, 986, in an opinion concurred in by the late Judge Lurton, aptly disposed of a contention very similar to the one in the instant case, as follows:

> The juice of vegetables or fruit is nothing but the sap obtained by expression. If the sap is subjected to heat and evaporation, the article thus produced is generally understood to be a different

thing from the sap. Thus, the sap of the sugar maple is different from the molasses which is obtained from the sap by boiling, and no one would think of including under the term "sap," if used in the tariff act, the molasses made therefrom. It is true that, for want of a better name, this (referring to the alleged cherry juice there in question) is called "concentrated cherry juice."

6. The argument of the court below that no substantial or harmful deception is practiced on the consumer.

The question reduced to its simplest form is, if the public knew that it was getting a product made from dried apples instead of fresh apples, would it indicate a preference for one or the other product, and has it a right to this information in order to enable it to exercise an intelligent judgment? If it has, it is plainly entitled to the information, and if so, this product should be so branded that the public will not be deceived or misled in expressing its preference. This is not to say that its quality is inferior; but suppose a customer desires cider vinegar made from the native juice of fresh apples, how is he to be assured that he can get it if there be nothing upon the label to distinguish the one article from the other, or how is a purchaser who prefers vinegar made from dried apples to get that article? Some designing retailer may impose genuine cider vinegar upon such a consumer because it may be impossible to distinguish between them analytically except for the trace of barium. Is the customer therefore to be denied this information? And is not the presence of the trace of barium, whether injurious or not, sufficient to require a distinction between these articles?

The Lexington Mills case only held that the flour was not adulterated by the presence of a trace of nitrates. *No charge of misbranding was involved in that case.*

The holding of the court below in effect that there is no substantial or harmful deception resulting from claimant's form of labelling its vinegar, ignores the factor of unfair competition with manufacturers of genuine apple cider vinegar, the prevention of which is within the scope and purpose of the Federal Food and Drugs Act. This legislative intention may be gathered from the report of the Congressional Committee in charge of the passage of the bill in the House of Representatives, wherein it is observed that

> "In the competition of modern business life it becomes necessary to give some protection to the legitimate manufacturer and dealer as against his dishonest and unscrupulous rival who unfairly competes with imitations and spurious articles of poor quality. (House Report No. 2118 59th Congress, 1st Session accompanying Senate Bill No. 88).

While it was the primary intent of Congress in the misbranding provisions of this statute, to prevent deception of the ultimate purchaser, yet these provisions also protect incidentally honest manufacturers against unfair competition. Laxity, therefore, in indulging the practice of equivocal labelling on the part of manufacturers ought to be condemned by the Court even if there be no substantial interest of the consumer involved in a particular case of this character. While it may be that the interest of the consumer is not substantially involved in every case of misbranding, misbranding is not therefore to be permitted under the terms of the law, since if

the honest manufacturer be not protected from unfair competitors who indulge in misbranding to gain an unfair advantage in the trade, the consumer will ultimately suffer from the discouragement to honest dealers thus brought about.

A cardinal principle, therefore, in the enforcement of labelling laws such as the Food and Drug Act requires that ambiguous or equivocal wordings upon a label *be resolved in favor of the consumer and against the manufacturer* who is the author of such label since otherwise the objects of the law will be frustrated.

In the present case the manufacturers of apple cider vinegar from the natural juice of fresh apples will be faced with a ruinous competition if the decision of this court shall stand. It may readily be deduced from the stipulated facts that claimant is placed by this decision in a highly advantageous position over its competitors who produce apple cider vinegar entirely from fresh apple juice, since the use of dried apples by claimant is primarily for the purpose of obtaining the article known as "pectin"—*the vinegar produced being a by-product.* This being the case claimant can undersell producers of the product from fresh apples by a considerable margin; and it is a fair argument that its unwillingness to distinguish its product from that of manufacturers of genuine apple cider vinegar is founded upon a desire to dominate the vinegar market and to obtain for its product all the advantages of the cider vinegar market without the corresponding obligation of delivering genuine apple cider vinegar for the price obtained in said market.

To lend the prestige of this court's decision to the sophistry upon which claimant's case rests, will estab-

lish a precedent which will be used detrimentally to the strict enforcement of the misbranding provisions of the Food and Drugs Act in *all cases where a food product is produced from dried fruit.*

It is respectfully submitted that no hardship will be imposed upon the claimant if it be compelled to label its product by some such truthful statement as vinegar made from evaporated apples and due to the alleged superior quality of the article, to create for it a popular good-will founded upon fair, honest and unequivocal dealing with the purchasing public.

VI.

The Deductions of the Court Below Believed to Be Erroneous.

1. That claimant is engaged in the manufacture of apple cider and apple cider vinegar from dried apples.

It does not appear that claimant is engaged in the manufacture of apple cider and apple cider vinegar from dried apples which is the question here (Opinion p. 30). It does appear that claimant is engaged in the manufacture of a product from dried apples which *it designates* as "apple cider" and "apple cider vinegar" (R. p. 11).

2. That the liquid from which this vinegar was made was manufactured from apples and from nothing else.

Assuming for the purpose of argument, the extreme contention of claimant, that the vinegar in question differs from apple cider vinegar made from fresh apples,

merely in the process of production, it remains, nevertheless, that misbranding may be predicated on this difference in view of the fact that the word "cider" upon the label connotes a distinction in process, if not in some other material particulars which appeals to and affects the ultimate purchaser's judgment of the product. Otherwise the word "cider" would not have been used.

The sugars and other soluble constituents of an apple are not the juice; the juice of an apple is the native fluid content which *carries in solution* some of the soluble constituents, and when this native juice is extracted from the apple by pressure or evaporation, what remains in the pomace of the pressed apple, or the dried residuum of the evaporated apple, is not juice; it consists of the fibrous and cellulous parts of the apple, the remaining sugars and starches and certain moisture not extracted in the native juice which has been taken away by pressure or evaporation.

Dried apples contain moisture but not juice. The juice has been so largely evaporated therefrom that the merest schoolboy would not be deceived into calling the remaining moisture cider or even juice. While juice may be loosely said to consist of water, *water is not juice.*

Apple pomace, the residuum from the cider press, contains juice in the same sense, although all the native juice possible has been pressed out; apple pomace contains moisture in the same manner as dried apples and a considerable quantity of sugars and other soluble constituents. If apple pomace be immersed in water these soluble constituents can be dissolved but the resultant solution will not be apple juice but water carrying in solution

these sugars and soluble constituents. The solution thus obtained from apple pomace can be fermented and made into vinegar just as readily as claimant's solution—indeed, some manufacturers of such products prefer apple pomace to dried apples for this purpose— but who would contend that a solution obtained by soaking apple pomace in water was cider, or that vinegar made therefrom was cider vinegar? Similarly the solution obtained by immersing dried apples in water may contain every chemical constituent of cider, but it is not cider. The cider, as that term has always been understood, has been removed by evaporation.

No dehydrated, organic article can be reproduced by the factitious addition of water. It can be imitated but not reproduced. Nature's process cannot be thus easily duplicated. Man is not God; he has only been created in His image.

It is absurd to assert that a solution obtained by soaking dried apples in water is cider. It merely resembles cider and is an imitation of it, and yet the makers of this product urge that they can change water into wine.

It must be kept in mind that it is the public which is to be protected and that it is the meaning of words as used and understood by the public, therefore, which is to be permitted on labels. The public knows the article by the common, ordinary meaning of the term used to distinguish it and must not be deceived or misled by the use of that term upon another article. This is the spirit of the law which should be enforced.

The liquid from which this vinegar was made was not, therefore, manufactured from apples and from nothing else, according to the natural and ordinary meaning of

that word, but was dried apples plus water, factitiously added to procure the solvent constituents of such dried apples.

3. That the government practically conceded that this liquid was apple cider.

It is not conceded that the liquid obtained from dried apples by this method is apple cider or that the vinegar obtained by this method is apple cider vinegar (Opinion p. 34). It is conceded that claimant *calls* these products respectively apple cider and apple cider vinegar (R. p. 11).

The serious contention of the government was not only that the fluid thus obtained from dried apples was not apple cider, but there was also no such concession in the agreed statement of facts, practically or otherwise.

It was apparently for the purpose of preventing any such deduction that the agreed statement (R. p. 12. Sub. 8) was made, to-wit: that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name "apple cider vinegar".

The initial statement, (R. p. 10, Sub. 1) to which we have referred, is that claimant has manfactured a product from evaporated apples which *it designates* as apple cider. The statement (R. p. 12, Sub. 6) is that since 1906 claimant has sold its product *as* apple cider and apple cider vinegar, the latter to the extent now of about 100,000 barrels a year, but there is no statement as to the extent to which it has sold this solution as apple cider, and the statement, (R. p. 12, Sub. 9) that for several

years prior to the Food and Drugs Act vinegar in large quantities and *to a certain extent* a beverage made from evaporated apples, were sold in various parts of the United States *as* apple cider is equally guarded. The fact is that this solution has never been sold in any considerable quantities as apple cider, nor could it be, for its difference from the apple cider to which everyone is accustomed in flavor, odor and color is so apparent that it would not be accepted where the genuine article was known or procurable.

The guarded way in which the agreed statement treats the terminology of both the solution from dried apples used by claimant and the designation and sale of these products as apple cider and apple cider vinegar escaped the attention of the court below.

4. That this liquid was obtained by pressure.

The weight superimposed on top of the dried apples is obviously to keep the dried apples from rising above the top of the tank as the water is absorbed; the pressure is negligible because the water which is not confined can readily rise above the weight and would overflow the tank except for the vent at the bottom of the tank. The pressure is not dissimilar to that which occurs when a sponge is immersed in water and dried apples absorb water like a sponge.

The purpose is to dissolve in an appropriate carrier like water, the soluble constituents in the dried apples. It could be accomplished quite as completely by immersing the dried apples in water in an open vat, but that would take more room and not be so convenient or rapid.

All the pressure which takes place within the tank would similarly take place in an open vat and the solution obtained by soaking dried apples in water in an open vat could hardly be said to be derived by pressure of any kind.

It is said that water is merely a carrier in cider vinegar for the other valuable constituents and therefore that the addition of water is not material. Similarly water is only a carrier in milk. Water is merely a carrier in our bodies for the other substances which exist. It is idle to say that water is a mere carrier and thus a negligible substance which can be factitiously substituted at will.

The solution obtained by claimant could be similarly obtained if the remaining moisture in dried apples had been completely evaporated, leaving only the sugars and other soluble constituents with the fibrous and cellulous parts of the apples. The moisture remaining in these dried apples plays no part except as it may make these sugars and other soluble constituents more readily soluble.

It is true that by grinding and pressing a quantity of these dried apples a thick, viscid fluid can be obtained, but this extract from them is no more like apple juice or cider than sawdust is like wood. So can a similar exudate be obtained by crushing and pressing raisins, but the thickened exudate thus obtained is not the juice of the fruit, much less its native juice; nor would the addition of water to this extract recreate a fruit juice. It would remain water carrying in solution such of the fruit constituents as could thus be expressed and dissolved. Its nature has been changed by the process of evaporation so that it is different in character, flavor, aroma and appearance.

And that is just what the solution produced by claimant is, which it miscalls cider; it is water carrying in solution such of the soluble constituents of the dried apples as can be dissolved—not pressed—by its tank process, an effluent which no one, however unconversant with the English language would ever expect to receive when he asked for cider.

The mathematical axiom that things which are equal to the same thing are equal to each other is not applicable to foods, especially where the only method of determining differences depends upon analytical science.

The characteristics of cider vinegar include certain congeneric substances which contribute to its aroma and flavor. There are volatile ethers and esters which are driven off or diminished by the heat of evaporation and their quantity is so small that their absence or diminution cannot be detected by practicable, physical analysis any more than the odor of a rose can be so measured or weighed. Modern analytical chemistry has made immense progress from the time when it knew no elements save earth, air and water, but it is impossible by purely analytical methods to yet determine the difference between the juices of an apple and a pear, and these ethereal characteristics of cider and cider vinegar cannot yet be segregated or estimated by any known methods. Yet nothing is more certain than that they exist in cider and cider vinegar and do not in this other product.

5. That this identical product has been accepted by the trade under this name.

It is not conceded that this identical product has been accepted by the trade under this name (Opinion p. 34).

It is conceded that it has been so sold both by claimant and others but there is no concession that such product has ever been accepted as either genuine cider or genuine apple cider vinegar (R. p. 12).

6. That these products are identical in taste, substance and chemical test with apple cider pressed from unevaporated apples or apple cider vinegar made therefrom.

It is not conceded that these products are identical in taste, substance or chemical test with apple cider pressed from unevaporated apples or apple cider vinegar made therefrom (Opinion p. 34). The concession is that the liquid obtained by claimant by this method upon chemical analysis will give results *similar* to those obtained by chemical analysis of the apple cider made from unevaporated apples except the trace of barium and that the vinegar made from this liquid is *similar* in taste and composition to the vinegar made from unevaporated apples with the same exception (R. p. 12).

The opinion in the District Court states that even Judge Westenhaver noticed "slight differences in appearance and taste" between the samples of genuine cider and genuine cider vinegar and claimant's product submitted to him (R. p. 15).

Such differences are inevitable. The superior quality of cider vinegar does not depend upon its acidity but on certain ethereal substances which impart its attractive flavor and aroma. While these cannot be measured by any known method of analysis it is noticeable that they exist in genuine cider and genuine cider vinegar and do not in claimant's products. They are largely driven off by the heat used in evaporation.

7. That the added water was substantially equivalent to what had been evaporated from the fresh apples.

The agreed statement as to this is peculiar and unsatisfactory. It is that (R. p. 11) "Such liquid, which is substantially equivalent to that which would have been obtained had unevaporated apples been used, etc." This statement is obviously incorrect because the treatment of fresh apples in a tank in the manner stated would produce practically no result; but the deduction of the court below that (Opinion p. 30) "substantially the same amount of pure water is added to the evaporated apples that is removed by the evaporating process" is equally incorrect.

The quantity of water used by claimant is not substantially the same as that removed by evaporation. It is at least double that quantity, as plainly appears in the agreed statement of facts and in practice many times that quantity.

A quantity of such dried apples with an amount of water substantially equivalent to that removed by evaporation is put in a tank with a weight superimposed to confine the dried apples as they swell and absorb the water. A further quantity of water is then introduced in the tank through a pipe while a vent opened at the bottom of the tank allows the effluent to escape until the soluble constituents in the dried apples have been dissolved out. In practice the quantity of the effluent "useful in the manufacture of vinegar" (R. p. 11) thus obtained, is substantially equivalent to what was evaporated from the apples, but the amount of water used in this process is thus *at least double* the amount removed from the fresh apples by evaporation as shown by the agreed

statement, and in actual practice several times that quantity because the first effluent from the tank is too poor in vinegar constituents to be "useful in the manufacture of vinegar" (R. p. 11), and is allowed to run away until it becomes rich enough to be useful.

VII.

The Assumptions of the Court Below Dehors the Agreed Statement Believed to Be Erroneous.

1. That sun-dried apples contain less moisture than the dried apples used by claimant.

The court assumed that the sun drying of apples produced a hard dried fruit containing less moisture than the dried apples used by claimant. This is not true as will readily appear upon examination of samples of such dried apples. In truth, the sun-drying of apples removes somewhat less of the liquid contents thereof than does the commercial evaporation of apples so that they contain more moisture than do the dried apples used by claimant.

Fresh apples consist of 88 to 90 per cent of water and if 80 per cent of this water be removed by evaporation, as stated in the agreed statement of facts, it is plain that the dried apples used by claimant have been reduced, as is indeed the truth, to much greater dryness than sun-dried apples.

Claimant would lead the court to believe that the dried apples used by claimant conformed to the definition of evaporated apples in Circular 136 of the Department of Agriculture and consisted of peeled, cored, sliced apples,

but such is not the fact nor does the agreed statement contain any such claim. The dried apples referred to in the agreed statement are whole, unpared, uncored apples chopped into convenient sizes and evaporated, known commercially as "chops". Commercial plants engaged in evaporating apples take the orchard run of all sizes, pare, core and slice the larger sizes for commercial evaporated apples, such as are described in Circular 136, and chop and evaporate the smaller sizes not available for commercial evaporated apples and dispose of them as "chops". This is what the agreed statement of facts means (R. P. 11 Sub. 2.) when it says that claimant uses "during the balance of the year evaporated apples of like quality, including as large a portion thereof as it can manufacture in its own plants." Translated into practice, this means that claimant produces in its own evaporating plants a small quantity of "chops" and buys a far greater quantity from commercial evaporating plants.

2. That the fresh apple season is too short for economical utilization of the apple crop.

The opinion states contrary to the fact that it is perfectly apparent that the apple season is altogether too short for the economical manufacture of the crop during the season into cider vinegar in sufficient quantities for public consumption (R. p. 32). There is no foundation for this statement. While the manufacture of cider is a seasonable business, there is ample time during the three months in the fall when the fresh apple crop is available to produce all the *cider* necessary for the manufacture of genuine cider vinegar which is a later and longer process

After the apple pressing season is over, the cider is fermented and manufactured into vinegar during the six or eight months following, so that while the cider is produced in the fall when fresh apples are available the alcoholic and acetous fermentations of the cider progress through the following winter and spring and into the following summer. Indeed there are manufacturers who adopt the practice of storing the cider to obtain, as they believe, a superior hard cider for the acetic fermentation into vinegar. In years when there is a large apple crop, surpluses of vinegar thus produced are carried forward in large quantities into succeeding years when a smaller crop makes the supply of fresh apples insufficient. But the well known excellence of cider vinegar and the higher cost of its production has led to every kind of imitation of it, by the use of colored distilled vinegar, molasses vinegar, corn syrup vinegar and many others and in recent years the production of an alleged cider vinegar from dried apples, dried apple skins and cores, and dried pomace, the aggregate of which deception has become so enormous as to seriously impair the market for cider vinegar.

This is not a mere trade controversy. It is a contest for honest labels and fair competition in the interest of the public for whose protection this act was passed. It is primarily for the purpose of enabling the public to know what it is buying, getting what it buys, and receiving sufficient information from the label to make an intelligent selection. If claimant's product be equal or superior to cider vinegar, claimant has nothing to fear and the public should have the information. If it be inferior, the public is likewise entitled to have the information.

Neither is it an effort to drive this product out of the market. It is an effort to compel it to sail under its own flag and win what recognition it receives on its own merits. It has too long hidden itself in the shadow of cider vinegar and should get out in the open and cast its own shadow by which the length of its days may be determined.

Nor is it an effort to drive this particular manufacturer out of business. We are opposed to the manufacture and sale of this product as cider vinegar by anyone and everyone engaged in this practice, which we believe to be unlawful and dishonest, and insist that they make and sell their product for what it is and on its own merits.

Similarly, alum baking powder formerly skulked in the shadow of cream of tartar baking powder until forced by the law to get out in the sun and cast its own shadow. To-day, it sells for what it is in open competition with other kinds of baking powder and the public with information as to what it is, makes a discriminating and intelligent choice, no longer deceived by its illegal and dishonest label.

3. That vinegar made from concentrated cider with added water could legally be called cider vinegar.

The opinion states that it would hardly be contended that vinegar made from evaporated cider to which water had been added would not be apple cider vinegar. It is seriously contended that it would not. A large article of commerce is concentrated or boiled cider reduced by heat from five volumes to one and manufacturers frequently

dilute this concentrated or boiled cider with water and make vinegar therefrom but the branding or sale of such vinegar as cider vinegar has always been condemned both by the Government and state authorities and many successful prosecutions of such a product have made.

4. That decayed apples are used in the manufacture of genuine cider vinegar as stated in the Standard Encyclopedia.

Neither is the quotation in the opinion from the Standard Encyclopedia with reference to the manufacture of cider from decayed fruit in accord with the facts nor with the other literature on the subject. It is recognized throughout the industry that decayed fruit is a detriment in the manufacture of cider and cider vinegar and there is nowhere in the United States that such material is used by reputable manufacturers. Indeed, manufacturers often buy whole orchards in their effort to obtain the best grade of fruit obtainable although the price of the grades fit for barrelling usually prohibits their use for cider and cider vinegar, but sound, ripe, mature apples, free from rot or ferment, are demanded and used for the manufacture of genuine cider and genuine cider vinegar, and immature, decayed or fermented apples are rejected. In their effort to improve the quality of their cider and cider vinegar, many manufacturers beside thus selecting them, wash all apples before pressing, and this is required by the laws of some of our states, such as Michigan. If any manufacturers use such material as is described in the Standard Encyclopedia, they do not produce genuine cider or genuine cider vinegar.

5. That water in large proportions is added to apple pomace in the production of genuine cider vingar.

The agreed statement of facts does not include any suggestion nor is there any foundation for the statement that cider manufacturers add 50 per cent or any other quantity of water to apple pomace in order to submit the apple pomace to a second pressing, and add the liquid thus obtained to the cider produced from first pressing, and so far as this suggestion may have influenced the court, the statement is not only outside the record but entirely untrue.

6. That claimant's product has been unchallenged for many years.

It is not conceded that the sale of claimant's product for many years has been without challenge.

The very Government circulars referred to in the agreed statement of facts, such as Food Inspection Decision 140, which was issued in 1912, as the result of a general hearing of all vinegar manufacturers, held in Washington in August, 1911, by Secretary Wilson, then Secretary of Agriculture, distinctly declares that vinegar made from dried apples shall not be entitled *even to be called vinegar* without further designation to show the material from which it is produced, and scores of successful prosecutions of other manufacturers of misbranded cider vinegar made from dried apples have been instituted by Federal and state governments since the enactment of the Food and Drugs Act, which has been copied into the statutes of many states. *The claimant here is the only manufacturer in the country who has resisted this ruling.*

Nor is the fact that claimant has been engaged in manufacturing such products and selling them as apple cider and apple cider vinegar for many years relevant to the question at bar, nor is the claimant entitled to any consideration by reason thereof.

The same claim to impairment of vested rights was made in People v. Girard, 145 N. Y., 105, 109, where Judge Finch disposed of it tersely as follows:

> "There is talk of interference with the vested rights of the individual. Sometimes it is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true and natural appearance; in plain words, a vested right to deceive the public."

7. That the Act only provides against deception "to the prejudice or harm" of the purchaser.

The opinion suggests that the purpose of the statute is to protect the purchaser from being misled to his "prejudice or harm", but this is not the language of the statute, which declares that a package shall be deemed misbranded if it or its label shall bear any statement, design, or device, regarding such article or the ingredients or substances contained therein, which shall be *false or misleading in any particular.*

VIII.

Important Parts of the Agreed Statement to Which the Court Below Failed to Give Due Weight.

1. The vinegar in question is a by-product in the manufacture of pectin by claimant.

The court below overlooked the significance of the statement that from the pulp of the dried apples after the production of the liquid therefrom in the manner described, the claimant manufactures a product called "pectin." (R. .p 11)

Pectin is the property of an apple which causes fruit juice to coagulate into jelly. It is associated with the cellulous parts of the apple and the principal business of the claimant is the manufacture and sale of this pectin under the name "Certo" and otherwise which it thus derives as stated from the residuum left in the tank after the soluble constituents have been dissolved therefrom with water. The solution thus obtained is therefore a by-product in the process of manufacturing pectin and, if it were not economic waste, claimant could throw this solution away and still derive profit from its pectin, but it naturally seeks, since it is convertible into vinegar, to derive an additional profit from this by-product and, since it can obtain a better price by selling it as cider vinegar, seeks the benefit of this label and this market.

Others are now engaged in the manufacture of pectin and vinegar from dried chops, dried apple skins and cores, and dried apple pomace. If this vinegar by-product can be sold under a label which will disguise its character, many others will engage in it. Those able to employ the most skillful chemists and processes will naturally be most successful. The cheaper product will

drive the genuine and more expensive product from the market and the production of pure cider vinegar made exclusively from the native juice of fresh apples, as is done by those we represent, may cease and genuine cider vinegar cease to be an available article of consumption in this country.

Already, a public patent has been issued for a synthetic apple syrup (No. 1,436,290. Dated November 21, 1922. Synthetic Apple Oil.) We quote from this patent:

> "We have found that the odorous constituents of the apple include, in addition to the combination of substances described in Patent No. 1,366,541, issued to us under date of January 25, 1921, which substances are the amyl esters of formic, acetic, caproic and caprylic acids, together with acetaldehyde; also a very small amount of the aliphatic terpene alcohol known as geraniol. $C^{10}H^{18}O$. This substance may be considered to exist both in the free state and in the form of its esters, and it imparts to the apple a distinctive fragrance. Although contained in very small proportion in the most fragrant varieties of the fruit, it is believed to be a constituent of all apples.
>
> "Geraniol or its esters has been found to modify to a considerable degree the odor of our synthetic apple oil and to materially enhance its fragrance, thus enabling us to reproduce more truly and completely the natural odor of the choicest apples.
>
> "We claim:
>
> "1. A synthetic apple oil consisting of the amyl esters of formic, acetic, caproic and caprylic acids, acetaldehyde, geraniol, geranyl formate and geranyl acetate."

How long will it be before synthetic cider vinegar, which may not contain anything derived from an apple, will be produced by ingenious inventors and yet, because

it may be indistinguishable by any of the available means of science, will be foisted upon an unsuspecting public, who, finding that it resembles cider vinegar and will perform the offices of cider vinegar, will accept it in blissful ignorance that it is not the article known to them and their ancestors for generations as cider vinegar?

It is undoubtedly true, as stated in the opinion, that vinegar not made from apple cider, even though chemically equal to cider vinegar, may not be branded as such, but the misuse of the term cider in the claims made in the Allen patent referred to in the opinion in the court below (Opinion, p. 32) is irrelevant. What the patentee meant was that he preserved the cider flavor without the accompaniment of the useless water. Cider evaporated to dryness could not be still called cider by any stretch of the imagination.

2. Analogous applications of the decision of the court below.

Evaporated whole milk is on the market and powdered whole milk is on the market. How long will it be before butter is produced from either of these by restoring the water evaporated therefrom and with what confidence will the manufacturers of that product rely upon the decision made in this case, if it be affirmed, as establishing their right to market the same as butter without any indication that it is an imitation of the genuine article, since nothing has been used in its manufacture save what is derived from milk or cream with the evaporated water factitiously added thereto?

Dried, soaked peas have been upon the market for years. They are nowhere permitted to be sold without descriptive words to indicate that they have been through

the evaporation process, although, if the water be restored they are substantially identical with the canned green peas of commerce.

What limits can be set to the application of the principle that by the factitious addition of water to dried fruit products a liquid equivalent to the native juice can be produced? The products therefrom should not be allowed to masquerade as native juice products without distinction as to label, and how can it be said that the public is not entitled to this information because the distinction is a mere matter of process in production.

3. Ohio and other state statutes.

The court may also have overlooked the statutory definition of cider vinegar in Section 5787 of the Ohio law wherein it is defined to be the "product made by the alcoholic and subsequent acetous fermentations of the juice of apples," but this provision as well as the provision from the preceding section 5686 of that law requiring all vinegar to be made *wholly* from the fruit or grain from which it purports or is represented to be made, seems plainly to exclude the factitious addition of water in the manufacture of cider vinegar.

The statutes of many other states either expressly or by plain implication forbid the labelling of claimant's product as cider vinegar. A few examples will suffice:

Massachusetts. "Whoever labels, brands or sells as cider vinegar or as apple vinegar any vinegar not the exclusive product of alcoholic and subsequent acetous fermentation of the pure juice of fresh apples shall be punished by a fine of not more than $100." (General Laws chap. 94, sec. 171).

Maine. "The term cider vinegar, apple vinegar shall be construed to mean the product made exclusively from the expressed juice of clean, whole apples by alcoholic and subsequent acetous fermentation, the acids, solids and ash of which have been derived exclusively from the apples from which it was fermented." (Chap. 172, Laws 1923, sec. 2).

"For the purpose of this act vinegar shall be deemed to be adulterated if a product made from dried apples or from apple skins, apple cores and chops by the process of grinding and soaking with subsequent alcoholic and acetous fermentation of the solution thus obtained, is not plainly marked to show the material from which it is produced." (Chap. 171, Laws 1923, sec. 4).

Alabama. "The terms cider vinegar and apple cider or words of similar import shall be construed to mean the product made exclusively from the expressed juice of apples by alcoholic and subsequent acetous fermentations."

"The term evaporated apple products vinegar or vinegar made from evaporated apple products or words of similar import shall be construed to mean the product made by the alcoholic and subsequent acetous fermentations of the aqueous substance obtained from clean, sound, unfermented, dried, chopped apples or dried apple skins or cores." (Agricultural Code, Art. 9, sec. 1).

Missouri. Any person who "offers or exposes for sale as cider vinegar any vinegar not the legitimate product of pure juice known as apple cider or vinegar not made exclusively of said apple cider or vinegar into which foreign substances, drugs or acids have been introduced, as may appear on proper tests, shall be deemed guilty of a misdemeanor." (R. S. 1909, sec. 4841).

Pennsylvania. "No vinegar shall be sold or exposed for sale as apple or cider vinegar which is not the legitimate product of pure apple juice or vinegar not made exclusively of said apple cider or vinegar in which foreign substances, drugs or acids shall have been introduced as may appear upon proper test." (Act of June 18, 1897).

Under this statute the reduction of pure cider vinegar with water was held to be an adulteration.

Comm. vs. Burtnett, 58 P. Sup'r Ct. 604.

Subsequent to such decision the Act was amended by providing "that apple or cider vinegar may be sold which has been reduced to a strength of not less than 4 percentum by weight of acetic acid by the addition of pure water if the cask, barrel, keg or package containing such vinegar shall be plainly or distinctly marked or branded to conform to the actual contents thereof." (Act of July 11, 1917).

IX.

Importance of the Question Involved Not Clearly Apparent from the Agreed Statement.

The agreed statement of facts gives little indication of the importance of this question to the growers and producers of fresh apples and the manufacturers of cider and cider vinegar from the native juice of them.

Apple skins and cores as a by-product of evaporating plants are produced in immense quantities and run through their evaporators in a sulphur dioxide vapor bath in the same manner as they treat chopped, small

apples for the purpose of disposing of this by-product of the evaporator at a profit. Claimant is one of the large buyers of these dried apple skins and cores as well as of dried chops.

These dried apple skins and cores are as rich in sugars and soluble constituents as are the dried, chopped apples, and the solution obtained by soaking them in water is as rich in sugar constituents and as readily fermentable into vinegar, and the finished vinegar, whether made from dried chopped apples or dried skins and cores is indistinguishable. The residuum therefrom in the tank is as available for the manufacture of pectin, as the residuum described in the agreed statement, and the decision of the court below is relied upon and has been announced by claimant as a vindication of its right to market its vinegar made both from dried chops and dried skins and cores as apple cider vinegar. Other manufacturers of this product have either refrained from this attempt or suffered prosecution therefor and paid their fines or permitted condemnation of their goods. *This claimant is the only producer of such vinegar in this country who has attempted to justify such practices.*

If the decision made by the court below be allowed to stand and claimant be not restrained from this unfair and deceptive practice others who manufacture pectin and its by-product, vinegar made from dried, chopped apples, dried apple skins and cores and dried apple pomace, will, relying upon the decision of this court, adopt the same practice, and the flood of imitation cider vinegar thus placed upon the market, cheaper and easier to manufacture, will drive the older and better and more expensive article from the market, and thus ruin the

business of those who are endeavoring to produce genuine cider vinegar from the native juice of fresh apples, and destroy the apple growers market for cider apples.

The importance of the question upon this aspect is undeniable and incalculable and it is because this decision will be fraught with such consequences that consideration of it by this court has been sought, and the opportunity prayed to more fully and carefully lay before this court the facts and the arguments, than was afforded on the hearing of the appeal in the court below.

X.

The Decision in Favor of Claimant in the New York Court of Appeals.

People vs. Douglas Packing Co., 236 N. Y. 1, 139 N. E. 759 was an action for a penalty brought in the New York Supreme Court by the people against claimant for selling a similar product, similarly branded, under the statute of New York, providing that the term cider vinegar and apple vinegar should be construed to mean the product made exclusively from the pressed juice of apples by alcoholic and subsequent acetous fermentations, the acidity, solids and ash of which had been derived exclusively from the apples from which it was fermented.

In the trial court the people rested their case upon the concession by defendant that the vinegar in question was made from evaporated unpared apples designated as "chops" and offered no further evidence. Defendant then offered evidence to show its practice and products in detail. At the conclusion of the trial a verdict was directed against defendant by the trial judge, the judg-

ment was affirmed by the Appellate Division of the court, one justice dissenting, and reversed by the Court of Appeals, one judge dissenting. Thus in all the courts six judges held against defendant and seven in its favor.

The question of vinegar made from dried apples had once before been before the same court and the vinegar held misbranded as cider vinegar (People vs. Niagara Fruit Company, 75 N. Y. App. Div. 11, affirmed 173 N. Y. 629) but that decision was distinguished by the fact that coloring had been added to the vinegar made from dried apples in the earlier case, although barium carbonate had been used for the same purpose, viz: imitation, in the later case.

After the cause was argued in the Court of Appeals and while it was under consideration, the decision of the Sixth Circuit Court in the case at bar was announced and immediately transmitted by claimant's counsel to the New York Court of Appeals. It undoubtedly had much weight because the opinion in the New York Court of Appeals follows the decision thus rendered in the Sixth Circuit.

The New York Court of Appeals held in substance that it could not be presumed that the legislature intended to limit the labels in question to the juice of fresh apples or it would have said so. This conclusion is opposed to the uniform trend of prior misbranding decisions in that and other courts, to the common understanding of the people as to the meaning of the language used by the legislature and it is submitted was erroneous although the legislature of that state alone can correct the error.

XI.

Conclusion.

For all these reasons it is most earnestly urged that the decision of the court below should be reversed and the judgment of the District Court affirmed in order that the large interests engaged in the production of apples and in the manufacture of genuine cider vinegar may not have their business impaired and genuine cider vinegar not pass into history as a product which has been superseded by a cheaper imitation of it, upon whose merits the public have been unable to pass, through a deceptive label which did not reveal sufficient information for the public's intelligent judgment.

Rochester, N. Y., March 10, 1924.

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The American Farm Bureau Federation of Washington, D. C.,
The H. J. Heinz Company of Pittsburgh, Pa.,
The National Fruit Product Company of Washington, D. C., and
I. S. Dawes and Son, of Imlaystown, N. J.

Office Supreme Court, U. S.
FILED
APR 7 1926
WM. R. STANSBURY
Clerk

No. 559.

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY,
Claimant.

BRIEF OF JUDSON HARMON, AMICUS CURIAE.

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(Italics mine unless otherwise stated.)

I file this brief, by the courtesy of counsel and permission of the Court, on behalf of independent manufacturers of apple cider vinegar who are directly interested in the questions involved in the case (R. 12 [9]) and will be affected by the decision of this case.

Much of what is urged to justify the seizure and secure reversal of the Circuit Court of Appeals judgment is entirely outside of the record and requires no comment, except that the attempt to inject it is confession of weakness.

MATTERS SETTLED BY THE RECORD.

The record disposes of various grounds for reversal relied on for the Libellant:

Guaranty of compliance with laws.

Falsity of the statement in the label "Guaranteed to comply with all food laws" is not in itself one of the three specifications in the libel (R. 1, 2), though it is quoted as part of the label, which all depend on the alleged false statement that "apples" were used when in fact they were "evaporated or dried" apples. If it were, the statement would refer to laws applicable to the goods seized, and these are only the laws of New York where the vinegar was manufactured and the Federal laws under which they were seized, which are substantially alike.

Similar vinegar manufactured by the Claimant in the same way was held to comply with the former in *People* v. *Douglas Packing Co.*, 236 N. Y. 1 (139 N. E. 759), reversing s. c. 194 N. Y. S. 633, on which the District Court relied (R. 19).

The Federal laws exclude other State laws with respect to goods in interstate commerce as these were, having been shipped from New York to Ohio and seized while in the original packages (R. 2, II), *McDermott* v. *Wisconsin*, 228 U. S. 115.

The agreed statement disposes of the following:

ADULTERATION (R. 1 [a]).

As to food, except as to "Second" substitution of any *substance* "wholly or in part for the article," and "Third" the abstraction in whole or in

part of "any *valuable* constituent" (referring, of course, to the completed article), the Federal act (34 Stat., Sec. 7, p. 770) contains these qualifications:

"First." When "any *substance* has been mixed and packed with it so as to reduce or lower or *injuriously affect its quality or strength.*"

"Fourth. If it be mixed, colored," etc., in "a manner whereby *damage or inferiority is concealed.*"

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article *injurious to health.*"

"Sixth. If it consists in whole or in part of a *filthy, decomposed* or *putrid* animal or vegetable substance," etc., with other specifications of the same class.

Some State laws, to which decisions cited relate, specifically prohibit "foreign *substances,*" no matter what, without enquiry whether they are injurious or not, such as milk (a natural product) diluted with water in the Massachusetts and New Hampshire cases cited and followed in *Commonwealth* v. *Burtnett,* 58 Supr. Court (Pa.) 604, where 20% of water beyond the natural amount was added to apple juice, a plain dilution, contrary to the State statute whose purpose was held to be to forbid "*diminishing or lessening the active properties of the cider vinegar,*" etc. (p. 611). The excess of water was of course "a foreign substance" in such cases.

The burden is on the Libellant of proving that the vinegar seized was adulterated because it came

within the qualified terms of the Federal act above set out. There is no such proof, and the contrary appears from the agreed statement:—

After partial dehydration of the apples to preserve them for use after the apple season, "an amount of *pure* water *substantially equivalent to that removed* in the evaporating process has been added," and pressure applied "until the liquid" thereby produced "has carried off in solution *such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar*" (R. 11 [4]).

"Such liquid, which is substantially *equivalent in quantity* to that which would have been obtained had unevaporated apples been used, contains a small *and entirely harmless* quantity of sulphur dioxide (from the fumes used 'to prevent rot, fermentation,' etc., R. 11 [3]) which is removed during the process of *fining and filtration,* by the addition of barium carbonate, *or some other proper chemical agent,* which by precipitation eliminates the sulphur compounds" (R. 11 [4]).

"The liquid is then subjected to alcoholic and subsequent acetic fermentation *in the same manner followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples*" (id.).

"After fining and filtration the resultant liquid obtained by claimant upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except that the liquid made from evaporated apples contains *a trace* of barium (or of course of

another chemical used) incident to the process of manufacture. *There is no claim by the Libellant that the trace of barium* renders the product *deleterious or injurious to health"* (R. 12, 2nd par.).

Barium carbonate in sufficient quantity may be poisonous, though this does not appear in the record and is not charged in the libel, but the "trace" found in this vinegar being admitted to be entirely harmless, like the "infinitesimal quantity" of arsenic in *W. B. Wood Mfg. Co.* v. *U. S.*, 286 Fed. 84, 86 (2), the suggestion that, by mistake, too much might be used in some other vinegar can hardly be taken seriously as a ground for confiscating this vinegar, when, during nearly twenty years, no such thing is shown to have occurred.

In the following paragraph (3rd, R. 12), there is the same admission as to the vinegar made from the liquid, including the absence of claim that the *trace* of barium (or other chemical used) renders it *"deleterious or injurious to health."* It is also admitted that it "is similar *in taste and in composition* to vinegar made from unevaporated apples" (R. 12, 3rd par.), and that the vinegar so made by Claimant and seized is *"not inferior to that made from unevaporated apples"* (R. 12 [5]).

It is admitted that there is no chemical test which shows that anything but *pure water* was removed from the apples in the partial dehydration (R. 11 [3]). The burden being on Libellant, this is the same in effect as a finding that nothing but water was taken from the apples. That this was true is demonstrated by the admitted fact that both the juice and the vinegar thereafter produced do not differ either in *taste or composition* from those

obtained without such dehydration, and only "*pure water*" was restored (R. 11 [4]).

SUBSTITUTION (R. 2 [b]).

The above facts which prove that there was no adulteration under Sec. 7 as charged in the libel (a), prove also that no "substance has been substituted wholly or in part for the article" named in the label, contrary to Sec. 7, Food paragraph "Second"; and that it was not "mixed, colored, etc., whereby *damage or inferiority* is concealed," contrary to paragraph "Fourth".

IMITATION (R. 2 [c]).

So the seizure must be upheld, if at all, under the charge (R. 2 [c]), that the "alleged apple cider vinegar" is "misbranded in that it *is an imitation of and offered for sale under the distinctive name of another article*, to-wit, *apple cider vinegar*, contrary to and in violation of paragraph First of Section 8."

The article being called and admitted to be vinegar in the agreed statement (R. 11 [1], R. 12, par. 3 *et passim*), having been made from apples alone without adulteration, substitution or "damage or inferiority" concealed or disclosed, and "similar in taste and composition" to vinegar made from unevaporated apples, the case narrows to the single question:

Did the introduction of partial dehydration, interrupting or suspending the passage of the apples from orchard to barrel, so change its character that calling it "apple cider vinegar" was "misbranding" under the statute, though without the

partial dehydration it is admitted (R. 12 [8]) that calling it such would not have been misbranding?

The question is presented in two aspects:

(1) Considering the partial dehydration as part of the process of manufacture;

(2) Considering it as creating a new and independent article, viz.: "evaporated apples" or "dried apples" which, though apples and nothing else, had to be mentioned in the label as the substance employed, to escape the penalty for deception by misbranding.

The partial dehydration considered as part of the process of manufacture.

In strictness the dehydration was rather an interruption or suspension than a part of the process of making the vinegar, which began with cutting up the apples, because it temporarily stopped the process instead of advancing it. But the effect on the case is the same in either view, since only the process is involved.

The expressed intent and purpose of the Pure Food Act are to prevent injury and deceit. "Misbranding" is used in the title in direct connection with "adulterated," "poisonous or deleterious." Sec. 11 uses this language about imports of food: "Is adulterated or misbranded within the meaning of this Act *or otherwise dangerous to the health of the people of the United States.*" Sec. 8 defines "misbranding" as: "Any statement, design or device • • • which shall be *false* or *misleading* in any particular."

These are all words of sinister import which always imply fraud as the motive or harm as the result, or both. So the maxim *noscitur a sociis* applies to "misbranding," if it be necessary to resort to construction. The purpose of Congress is stated in *United State* v. *Lexington Mill Co.*, 232 U. S. 399, 409, to be *to prevent injury to the public health* by *"misbranded and adulterated foods" alike;* and the gist of misbranding is defined as: "Misrepresentation *as to character and quality.*"

The Act is penal, but some courts do not give it the usual strict construction for that reason, because its purpose is to protect the public health, etc. But if its purpose is broadened by construction so as to cover unsubstantial and fanciful things, the reason ceases which prevents the usual more strict construction in favor of the accused.

The purpose and effect of partial dehydration are laudable, viz.: to reduce the appalling waste of apples in this country and prevent idleness of labor and capital during the larger part of the year. It is conservation, in the best and broadest sense, of an article of food. The making of vinegar is not a closed art and citizens engaged in it do not lack the resourcefulness which is characteristic of Americans. They have already improved the art in the way just mentioned to which is due, certainly in large measure if not entirely, the increase in output from $2,254,000 in 1910 to $24,671,000 in 1920 (R. 13 [11]). It is asserted, entirely outside the record, on behalf of an Association of Vinegar Manufacturers, that "There is ample time, during the three months when the fresh apple crop is avail-

able, to produce all the cider necessary for the manufacture of genuine cider vinegar" (B. 42). This, in connection with the above increase in production and the fact that the Claimant and "many" other independent manufacturers make vinegar during "the balance of the year" (R. 11 [2], 12 [9]), strongly suggests that commercial rivalry and a desire to limit production, not concern for the public, supplied the pressure which secured the regulation in question and is pushing its enforcement.

These independents have also, during the same period, sold as "apple cider vinegar" the vinegar made from this cider, as well as the "apple cider" itself as a beverage (R. 12 [9]). I do not contend that long use will justify a clear violation of the provisions of the Act, but it is a cogent fact in deciding whether they have been violated.

Is this improvement to be penalized when the product is admitted to be the same and not inferior? Are future improvements to be so treated? The process is certainly improved, for in the primitive way of making vinegar, to which counsel would shackle the industry, "the process of fining and filtration" now used must have been imperfect. And instead of the "sound, mature" apples used by the Claimant (R. 11 [2]), "apples that will do for cider" were used, as every country bred person knows.

I do not contend that this would justify any real injury or deception, but that, unless the burden of proving these is fully borne, the property of citizens is not to be confiscated and their enterprise

publicly condemned, under an official order or regulation not justified by the law.

Washington's well known warning against the tendency of men entrusted with authority to broaden and magnify it has not prevented instances of this. Interference with private rights is sometimes through the adoption and enforcement of regulations by executive departments or officials which are not necessary to carry out the purpose of the laws conferring their authority, and sometimes through giving the laws a strained and unreasonable construction. The function of the courts is to protect citizens against this peril, and they have often done so. See, for instance,

U. S. v. *Eaton*, 144 U. S. 677, 687-8.
U. S. v. *George*, 228 U. S. 14, 20-22.

in which departmental regulations were held invalid because they went beyond the authority to make them "for carrying out the provisions of this act" (as in Sec. 3 of the Pure Food Act) and thus became legislation instead of administration. Also in *W. B. Wood Mfg. Co.* v. *U. S.*, 286 Fed. (C. C. A. 7) 84, 87 (4), 88, cited for Libellant. Please note that the label there contained the phrase "Complies with all *requirements*," which was held to cover rulings of the Department, instead of "pure food *laws*" as here.

In President Taft's decision referred to in the brief he said the purpose of the Act as to misbranding is "to prevent (the public) from being deceived as to *the real character* of drugs or articles of food offered for sale."

Also, speaking of a department regulation:

"It is *a perversion of the Pure Food Act* to attempt now to limit the meaning of the term 'Whiskey' to that which *modern manufacture* and taste have made the most desirable variety." If the regulation had forbidden labeling the product of "modern manufacture" as "whiskey" it would be like this case, but that was evidently considered absurd, though such is the effect of the argument here.

In *Smith* v. *Rheinstrom*, 65 Fed. 984 (also cited) decided by the present Chief Justice, natural cherry juice had been boiled down and 17 *per cent. of alcohol added.* The only question was whether, under the customs act, it was commercial cherry juice or an alcoholic compound; and it was of course held to be the latter. If no alcohol had been added it would no doubt have been held to be the former, because it had all its elements and nothing else and neither the abstraction of the water, if for convenience or reduced cost of shipment and not as part of a process of compounding, nor the restoration of the same amount of water would have changed its character.

The 20 per cent. of water left in the apples carried all the elements of the juice, for otherwise when the water evaporated was restored and pressure applied, the juice and the vinegar made from it could not be *"similar in taste and in composition"* to vinegar made without partial dehydration of the apples (R. 12).

For the same reasons, admitted (R. 12, par. 2), this juice was as truly apple cider as the juice from

apples not so dehydrated. The vinegar could not be the same if the juice was not. There was no attempt to show that the juice used was not available for sale and use as cider the same as juice from apples not dehydrated. On the contrary, it is admitted, as above stated, that since several years before the passage of the act it has been sold as a beverage under the name "Apple cider" (R. 12 [9]). The alcoholic fermentation must be complete before the acetic fermentation can begin. It is well known from the public press that it is (or was) a common practice to concentrate and remove the alcohol in fermented cider by expelling the water with cream separators, since the specific gravities differ. Suppose one having done this should repent, restore the alcohol and let the acetic fermentation occur; would the product be any the less apple cider vinegar because its progress from apples to vinegar was thus temporarily interrupted, if every test and analysis showed that the product was not affected by the interruption? Or suppose it should be found, in the progress of the art, that it would facilitate or cheapen manufacture, without changing character or quality, and thus reduce the price of vinegar, either to hasten or to retard fermentation of the juice expressed from apples as they came from the tree, would the fact that this had been done have to be stated to avoid confiscation and penalty? Or that keeping the apples from rot by freezing instead of partial dehydration would reduce the price or improve the product? Or would the fact that the apples used had been kept in cold storage have to be stated, because of

the well known prejudice against articles so stored, though it made no difference in the product?

The omission to require a statement of the process by which an article is produced, or of the treatment of the primary substance used, proves an intention not to require it. This was doubtless to avoid the injury to manufacturers which disclosure to rivals of their methods, which may be secret, might inflict, and also because the public is amply protected by the other provisions of the act as to the *origin, nature and quality* of the *product*. And no administrative order, regulation or decision can enforce a requirement which the act thus omitted. If the maker chooses to disclose the process or methods he must do it truthfully, but as every one is presumed to know that the law does not require such disclosure there can be no deception if the label truly states the character of the article and its origin.

Every one, in America at least, must be presumed to know that improvements are being continually made in all industrial enterprises and that the general practice is to make fruits available after their season by preventing decay. How this is done does not matter if the product is not changed in character or quality.

A complete analogy in support of the Claimant's case is furnished by the Pure Food Department itself in its action relative to maple syrup. The sap of the maple tree is the basis material from which the water is partially evaporated to make syrup and further evaporated to make sugar. Yet when the water is restored to the sugar and it is

melted into syrup the label "Maple Syrup" is not a misbrand (Circular 136). Counsel, to be consistent, must assert that the brand should be "Maple Sugar Syrup."

The apples so partially dehydrated did not become a new and independent article which Claimant was required by the act to state as the substance used.

While the agreed statement refers to dehydrated apples and apples not dehydrated, and to the juice expressed from each, the former are not the "dried apples" or "evaporated apples" which are known, sold and used as food by that name. It is common knowledge that the latter are both peeled and cored before drying, so that they are only *parts* of apples, while the apples used in making the seized vinegar were neither peeled nor cored *but the entire apples were used.* This appears from the use of the word "apples" in the agreed statement without qualification, though it is not shown explicitly as in *People* v. *Douglas Packing Co., supra,* where the exact process is given in more detail, viz.: the entire apples are cut into thin slices and partly evaporated, being then known as apple "chops." The apples must, of course, be broken up in some way before evaporation can be applied to the water in them and before the juice is expressed. The "dried apples" or "evaporated apples" known to commerce and in common use are only the insides of apples, less the cores, cut into eight segments and dried sufficiently to stand transportation, storage, handling and indefinite

delay in use, while from the sliced apples used here only enough water was taken to keep them in the factory for a shorter period. They were not and could not become articles of commerce or be used as food.

What is lost with the skins and cores is not shown, but it is fair to presume that something is lost, in color, nutriment and taste. This is proved by the known use of them in manufactures.

> "The better specimens (of culls) are usually evaporated, *the cores and peelings being also utilized either for cider making,* or more frequently they are dried and shipped to Europe for *the manufacture of certain kinds of champagne and other wines.*" Encyclopedia Americana, Apples, "By-Products."

So vinegar made from apples peeled and cored, whether dried or not, would come within the prohibition of Food Section 7 "Second," since a "valuable constituent" would be "abstracted," though vinegar made from the peelings and cores would be "apple cider vinegar" because, as part of the "meat" remains with them, such vinegar contains all the elements of the fruit. The brand insisted on for the seized vinegar, "dried apple cider vinegar," or "vinegar made from the juice of dried apples," would be false, because it was made from whole apples and not from parts. And since, as I have shown, the partial removal of water during or as part of the process was not a fact whose statement the law requires, and, as admitted, the "*taste and composition*" were not changed thereby,

nor the vinegar made inferior, it was properly labeled.

The district judge found "slight differences in appearance and taste" in the samples of cider and of vinegar from both the partially evaporated and the unevaporated apples. But it does not appear that the same kind of apples were used in each, and these "slight differences" might well be due to differences of the apples used in color, in sweetness or lack of it, or in natural taste. No samples from "dried apples" were before him.

It is certainly dropping the declared purposes of the Pure Food Act below the horizon to test "misbranding" by the desires of an imaginary being who chooses his vinegar by its "bouquet," as one does (or did) with wines!

Even if, by forced construction of the law, the entire apples partly dehydrated could be considered no longer apples in course of manufacture into vinegar, they are wholly products or derivatives of apples. And while the act, Section 8 "Second" in the case of drugs, requires a statement of the amount of certain named derivatives and also in Section 8 "Second" in case of food, it is because these are dangerous *substances* and are *actual ingredients,* which a mere *"trace"* is not. See *U. S.* v. *Anti-Kamnia Co.,* 231 U. S. 654, 665-7. The omission to do the like with respect to food products generally proves the intention not to require such statement as to them.

I submit that the substance used in the seized vinegar was apples as they grew on the trees; that they were never anything but apples in course of manufacture; and that the vinegar produced was

"apple cider vinegar" and properly so labeled. It is admitted in the brief for Claimant that vinegars are designated in the dictionaries and elsewhere by the names of the fruits from which they are derived. No instance is shown where they are designated otherwise, or where the word "fresh" is used. And, if it were used, these apples were fresh when the process of manufacture began by slicing them up.

The inquiry what the objection is to changing the label so as to show the partial dehydration pending manufacture simply begs the question to be decided. The Claimant does not say its product is "something just as good" as apple cider vinegar, but that it *is* apple cider vinegar. It has therefore the right to call it by that name which it has borne unchallenged for many years (R. 12 [9]). To qualify the name, no matter how, would delight its competitors who would proclaim it as confession of substantial difference or inferiority, though it is admitted that there is neither.

Judicial notice taken by the District Court.

The trial court reached its decision only by taking judicial notice that "apple cider vinegar" means to the ordinary mind vinegar made from "fresh and undried apples" (R. 18). The meaning of this appears from the illustration used (id.) that a merchant advertising apples for sale "could not compel a purchaser to accept dried or evaporated apples." The fallacy of applying this supposed case to the case in hand is obvious. The contract of sale would be of apples in their natural

state and the buyer could no more be compelled to accept apples cut up or mashed for immediate use in making cider than apples sliced and partly dried for later use.

In *Brown* v. *Piper*, 91 U. S. 37, 42-3, dealing with judicial notice, it was held:

> "This power is to be exercised by courts with caution. Care must be taken that *the requisite notoriety* exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

In the present case there was no evidence as to the commercial meaning of "apple cider vinegar," nor any proof, as in *Nix* v. *Hedden*, 149 U. S. 304, that the words had no commercial meaning different from the ordinary meaning so as to permit the court to take judicial notice of the latter.

But if the ordinary meaning could be resorted to it is not what the trial court supposed it to be, as shown either by dictionaries as an aid or by "the requisite notoriety." That the substance from which such cider is derived is the apple is generally known; also that it is made by pressing out the juice and subjecting it to fermentation; but the general public knows little and cares less, when the product is what it is familiar with by use, what the exact steps of the process are, nor whether they proceed in close succession or not, nor whether after the apples are gathered decay is prevented until they can be used, nor how this is done.

Some older persons familiar with country life will remember the cider mill in the orchard or

barn operated by hand or horse power and the cider put in barrels in the cellar and left to settle and ferment without "fining and filtration." But it is certainly notorious that this primitive by-product of the farm has long been obsolete, replaced by the output of large factories requiring the assembling by shipment and storage of large quantities of apples which in the nature of things can not be immediately used and are subject to decay, and operated by the improved machinery and methods of "modern manufacture." The exact nature of these methods certainly is not and can not be generally known. The label does not disclose or profess to disclose them, so that persons who assume them to be other than they are, if they can be said to be deceived at all, are self-deceived. But all persons are conclusively presumed to know the provisions of the law which protects consumers by regulations of the product only, wisely leaving free as to processes of preservation and production the fertile genius of our manufacturers. If judicial notice is to be taken of anything it should be of this.

No decisions under the Federal act have been cited (except those of district courts on the exact question here presented) and I know of none where a charge of misbranding has been upheld on such a fanciful ground as that relied on here. The proper view is well stated by Judge Brown in *In re Wilson,* 168 Fed. 566, 568:

> "The court would be obliged to go entirely beyond all the established legal principles upon the question of deceit and misrepresentation,

and beyond any of the decisions of the equity courts as to what is abhorrent to the conscience of a chancellor. In fact, I think we should be obliged to go not only outside the boundaries of legal and equitable rules, but also outside the boundaries of rational common sense.

From examination of former cases dealing with the subject of misleading representations of labels, I am impressed with the great value of the legislation known as the 'Pure Food Act,' but I am further impressed with the fact that an attempt to apply that act to cases of this character can not but serve to bring that act into such disfavor as to impair its usefulness. The distinction between the enforcement of law and the abuse of law is lost sight of in the attempt to make this obviously innocent act a criminal misdemeanor."

In that case the label was "Gold Leaf Syrup composed of Maple and White Sugar," with a representation of a maple leaf. The charge was that the label and device were calculated to lead purchasers to believe that maple sugar was the principal or a substantial part of the compound, whereas it was only 10 per cent. of it.

There is nothing in the present case which equals the *innuendo* from the maple leaf. The article there was sold as a compound without reference to the proportions of the components. The article here was sold as vinegar made from apples by fermentations of their juice without reference to particulars of the various stages of the manufacture, which it is admitted did not affect either the iden-

tity or the qualities of the product, the only things of concern to consumers.

In re Wilson, supra, was cited and followed in *U. S.* v. *Boeckmann,* 176 Fed. 382, and the same principle was applied in *Nave-McCord Mercantile Co.* v. *U. S.,* 182 Fed. (C. C. A. 8) 46.

The independent decisions of the Circuit Court of Appeals in the present case and of the Court of Appeals of New York, on statutes substantially alike, were rendered after full argument and briefs by counsel and briefs by the same *amici curiae* who are permitted to appear here. In both petitions for rehearing were considered and overruled. In so far as I may be thought to have added little to the reasoning of those decisions, I beg the indulgence of the court.

Respectfully submitted,

JUDSON HARMON,
Amicus Curiae.

March, 1924.

UNITED STATES *v.* NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY, CLAIMANT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 559. Argued April 10, 11, 1924.—Decided June 2, 1924.

1. The purpose of the Food and Drugs Act in forbidding misbranding is to prevent the use of misleading statements as well as those which are false. P. 442.
2. Vinegar made from dried apples by adding water equivalent to that removed in the drying and fermenting the resulting solution, even though it be similar to vinegar produced directly from fresh apple cider and equally wholesome, is not the same thing; and a label describing it as "apple cider vinegar made from selected apples" is misleading to the public, and a misbranding within the meaning of the Food and Drugs Act. P. 443.

289 Fed. 181, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court condemning divers barrels of vinegar under the Food and Drugs Act.

Mr. J. A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. L. C. Spieth, with whom *Mr. John G. White* and *Mr. A. V. Cannon* were on the brief, for respondent.

Mr. Judson Harmon, by leave of Court, filed a brief as *amicus curiae.*

Mr. Wm. W. Armstrong, by leave of Court, filed a brief as *amicus curiae.*

MR. JUSTICE BUTLER delivered the opinion of the Court.

This case arises under the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. The United States filed information in the District Court for the Northern District of Ohio, Eastern Division, for the condemnation of 95 barrels of vinegar. Every barrel seized was labeled:

"Douglas Packing Company
Excelsior Brand Apple Cider Vinegar made
from Selected Apples
Reduced to 4 Percentum
Rochester, N. Y."

The information alleged that the vinegar was adulterated, in violation of § 7 of the act. It also alleged that the vinegar was made from dried or evaporated apples, and was misbranded in violation of § 8, in that the statements on the label were false and misleading, and in that it was an imitation of and offered for sale under the distinctive name of another article, namely apple cider vinegar.

The Douglas Packing Company appeared as claimant, and by its answer admitted that the vinegar was labeled as alleged, and that evaporated apples had been used in its manufacture. It averred that nevertheless it was pure cider vinegar and denied adulteration and misbranding. A jury was waived, and the case was submitted on the pleadings and an agreed statement of facts. The court found that the charge of adulteration was not sustained, but held that the vinegar was misbranded. Claimant appealed, and the Circuit Court of Appeals reversed the judgment. 289 Fed. 181. Certiorari was allowed. 263 U. S. 695.

The question for decision is whether the vinegar was misbranded.

The substance of the agreed statement of facts may be set forth briefly. Claimant is engaged in the manufacture of food products from evaporated and unevaporated apples. During the apple season, from about September 25 to December 15, it makes apple cider and apple cider vinegar from fresh or unevaporated apples. During the balance of the year, it makes products which it designates as "apple cider" and "apple cider vinegar" from evaporated apples. The most approved process for dehydrating apples is used, and, in applying it, small quantities of sulphur fumes are employed to prevent rot, fermentation, and consequent discoloration. The principal result of dehydration is the removal of about 80 per cent. of the water. Whether, and to what extent, any other constituents of the apple are removed is not beyond controversy; in the present state of chemical science, no accepted test or method of analysis is provided for the making of such determination. Only mature fruit, free from rot and ferment, can be used economically and advantageously.

In manufacturing, claimant places in a receptacle a quantity of evaporated apples to which an amount of pure water substantially equivalent to that removed in the evaporating process has been added. A heavy weight is placed on top of the apples and a stream of water is introduced at the top of the receptacle through a pipe and is applied until the liquid, released through a vent at the bottom, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar. Such liquid, which is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used, carries a small and entirely harmless quantity of sulphur dioxide, which is removed during the process of fining and filtration by the addition of barium carbonate or some other proper chemical agent. The liquid is then subjected to alcoholic and subsequent

acetic fermentation in the same manner as that followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples. Claimant employs the same receptacles, equipment and process of manufacturing for evaporated as for unevaporated apples, except that in the case of evaporated apples, pure water is added as above described, and in the process of fining and filtration, an additional chemical is used to precipitate any sulphur compounds present and resulting from dehydration.

The resulting liquid, upon chemical analysis, gives results similar to those obtained from an analysis of apple cider made from unevaporated apples, except that it contains a trace of barium incident to the process of manufacture. Vinegar so made is similar in taste and in composition to the vinegar made from unevaporated apples, except that the vinegar made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by libellant that this trace of barium renders it deleterious or injurious to health. It was conceded that the vinegar involved in these proceedings was vinegar made from dried or evaporated apples by substantially the process above described. There is no claim by the libellant that the vinegar was inferior to that made from fresh or unevaporated apples.

Since 1906, claimant has sold throughout the United States its product manufactured from unevaporated as well as from evaporated apples as "apple cider" and "apple cider vinegar", selling its vinegar under the brand above quoted, or under the brand "Sun Bright Brand apple cider vinegar made from selected apples". Its output of vinegar is about 100,000 barrels a year. Before and since the passage of the Food and Drugs Act, vinegar in large quantities, and to a certain extent a beverage, made from evaporated apples, were sold in various parts of the United States as "apple cider vinegar" and "apple

cider," respectively, by many manufacturers. Claimant, in manufacturing and selling such products so labeled, acted in good faith. The Department of Agriculture has never sanctioned this labeling, and its attitude with reference thereto is evidenced by the definition of "apple cider vinegar" set forth in Circulars 13, 17, 19 and 136, and Food Inspection Decision 140.[1] It is stipulated that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name "apple cider vinegar."

Section 6 of the act provides that, " . . . The term 'food', as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." Section 8 provides, "That the term 'misbranded', as used herein, shall apply to all . . . articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, . . . That for the purposes of this Act an article shall also be deemed to be misbranded: . . . In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. Second. If it be labeled or branded so as to deceive or mislead the purchaser, . . . Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular. . . ."

The statute is plain and direct. Its comprehensive terms condemn every statement, design and device which

[1] The definition referred to is, "Vinegar, cider vinegar, apple vinegar, is the product made by the alcoholic and subsequent acetous fermentations of the juice of apples. . . ."

may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is. *United States* v. *Schider*, 246 U. S. 519, 522; *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 409; *United States* v. *Antikamnia Co.*, 231 U. S. 654, 665.

The vinegar made from dried apples was not the same as that which would have been produced from the apples without dehydration. The dehydration took from them about 80 per cent. of their water content,—an amount in excess of two-thirds of the total of their constituent elements. The substance removed was a part of their juice from which cider and vinegar would have been made if the apples had been used in their natural state. That element was not replaced. The substance extracted from dried apples is different from the pressed out juice of apples. Samples of cider fermented and unfermented made from fresh and evaporated apples, and vinegar made from both kinds of cider were submitted to and examined by the District Judge who tried the case. He found that there were slight differences in appearance and taste, but that all had the appearance and taste of cider and vinegar. While the vinegar in question made from dried apples was like or similar to that which would have been produced by the use of fresh apples, it was not the identical product. The added water, constituting an element amounting to more than one-half of the total of all in-

gredients of the vinegar, never was a constituent element or part of the apples. The use of dried apples necessarily results in a different product.

If an article is not the identical thing that the brand indicates it to be, it is misbranded. The vinegar in question was not the identical thing that the statement "Excelsior Brand Apple Cider Vinegar made from selected apples", indicated it to be. These words are to be considered in view of the admitted facts and others of which the court may take judicial notice. The words "Excelsior Brand", calculated to give the impression of superiority, may be put to one side as not liable to mislead. But the words, "apple cider vinegar made from selected apples" are misleading. Apple cider vinegar is made from apple cider. Cider is the expressed juice of apples and is so popularly and generally known. See *Eureka Vinegar Co.* v. *Gazette Printing Co.*, 35 Fed. 570; *Hildick Apple Juice Co.* v. *Williams*, 269 Fed. 184; *Monroe Cider Vinegar & Fruit Co.* v. *Riordan*, 280 Fed. 624, 626; *Sterling Cider Co.* v. *Casey*, 285 Fed. 885; affirmed 294 Fed. 426. It was stipulated that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name "apple cider vinegar". The vinegar in question was not the same as if made from apples without dehydration. The name "apple cider vinegar" included in the brand did not represent the article to be what it really was; and, in effect, did represent it to be what it was not,—vinegar made from fresh or unevaporated apples. The words "made from selected apples" indicate that the apples used were chosen with special regard to their fitness for the purpose of making apple cider vinegar. They give no hint that the vinegar was made from dried apples, or that the larger part of the moisture content of the apples was eliminated and water substituted therefor. As used

on the label, they aid the misrepresentation made by the words "apple cider vinegar".

The misrepresentation was in respect of the vinegar itself, and did not relate to the method of production merely. When considered independently of the product, the method of manufacture is not material. The act requires no disclosure concerning it. And it makes no difference whether vinegar made from dried apples is or is not inferior to apple cider vinegar.

The label was misleading as to the vinegar, its substance and ingredients. The facts admitted sustain the charge of misbranding.

Judgment reversed.